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IN THE

Supreme Court of the United States

Hwang Geum Joo, Yuan Zhulin, Lola Tomasa Salinog, Liu Huang A-tau, Kim Boon-sun, Kim Sang Hee, Kim Soon-Duk, Yi Yong Nyo, Kim Bok-Dong, Lu Xiuzhen, Guo Yaying, Zhu Qiaomei, Prescila Bartonico, Narcisa Claveria, Maxima Regala de la Cruz, on behalf of themselves and all others similarly situated,

Petitioners,

v.

Government of Japan,

Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the District of Columbia Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The Foreign Sovereign Immunities Act of 1976 ("FSIA"), 28 U.S.C. § 1601-11, codifies the restrictive theory of sovereign immunity adopted by the United States Department of State in 1952. The FSIA enumerates several exceptions to sovereign immunity, including exceptions for commercial activity and expropriation by foreign states. 28 U.S.C. § 1605(a)(2)-(3). In *Republic of Austria v. Altmann*, 124 S. Ct. 46 (Sept. 30, 2003), the Court granted certiorari to resolve the following question: "Does the expropriation exception of the [FSIA] afford jurisdiction over claims against foreign states based on conduct that occurred before the United States adopted the restrictive theory of sovereign immunity in 1952?"

Two closely related, and equally important, questions are presented here:

1. Does the commercial activity exception of the FSIA afford jurisdiction over claims against foreign states based on conduct that occurred before the United States adopted the restrictive theory of sovereign immunity in 1952?

2. Even absent the FSIA, are enemy nations entitled to sovereign immunity from suits based on their wartime acts, particularly when those acts occur on United States soil?

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The opinion of the district court is reported at 172 F. Supp. 2d 52, and is reproduced in the Appendix at 17a. The opinion of the United States Court of Appeals for the District of Columbia Circuit is reported at 332 F.3d 679, and is reproduced in the Appendix at 1a. The D.C. Circuit's orders denying rehearing and rehearing *en banc* are not reported and are reproduced in the Appendix at 46a and 47a.

JURISDICTION

The D.C. Circuit rendered its opinion on June 27, 2003, App. 1a, and denied rehearing and rehearing *en banc* by Orders dated August 22, 2003. App. 46a, 47a. This Court has jurisdiction to review this matter on a writ of certiorari pursuant to 28 U.S.C. § 1254(1).

RELEVANT STATUTES AND TREATY

The provisions of 28 U.S.C. §§ 1254(1), 1330, 1331, 1350, 1367, 1602, 1605(a)(2), and 1605(a)(5); and the 1951 Treaty of Peace with Japan are lengthy. Pursuant to Supreme Court Rule 14.1(f), they are set out verbatim at Appendix 48a-89a.

STATEMENT OF THE CASE

This case concerns whether the nation of Japan is liable for trafficking in women and girls. Petitioners are fifteen women from China, Taiwan, North and South Korea, and the Philippines who were taken by force, coercion or deception by the Japanese military between 1931 and 1945 and forced to serve as sex slaves – euphemistically known as "comfort women" – in state-run brothels, or "comfort stations," where they were repeatedly raped and beaten by

Japanese soldiers. Complaint ("Cpt."), ¶¶ 1, 7-21; App. 92a, 94a-110a.[1] The state-run comfort stations were operated as businesses where Japanese soldiers were required to pay for the use of the women. Cpt. ¶¶ 8, 55; App. 95a-97a, 121a. The prices charged to solders varied according to the women's perceived ethnic inferiority. *Id.* One of the Petitioners was only ten years old at the time of her abduction and enslavement. Cpt. ¶ 20; App. 107a-109a. The others ranged in age from thirteen to twenty-six. Cpt. ¶¶ 7-19, 21; App. 92a-107a, 109a-110a. To this day, these women still bear the physical and psychological scars of their brutalization at the hands of the Japanese government. Cpt. ¶¶ 7-21, 64; App. 92a-110a, 124a.

Historians estimate that Japan enslaved as many as 200,000 comfort women before and during World War II, and that only about 30% of them survived the war. David Boling, *Mass Rape, Enforced Prostitution, and the Japanese Imperial Army: Japan Eschews International Legal Responsibility?,* 32 COLUM. J. TRANSNAT'L L. 533, 541-42 (1995). Most comfort women came from Korea, China, and other Asian countries occupied by Japan, *id.,* but a recently declassified document indicates that approximately twenty American nurses were captured by the Japanese military at Corregidor and forced to serve as sex slaves. Fletcher F. Isbell, *Military Attache Report New Guinea: Jap Prostitution of Nurses Captured at Corregidor*, Military Intelligence Division W.D.G.S., Report No. 32 (August 21, 1944) at 1. Japan operated comfort stations throughout the areas of Asia

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[1] In reviewing a decision granting a motion to dismiss, this Court accepts as true all factual allegations in the Complaint. *Swierkiewicz v. Sorema N.A.,* 534 U.S. 506, 508 n.1 (2002).

and the Pacific it controlled during the war, including on American territory in Guam and the Philippines. Cpt. ¶ 57, App. 122a; Yoshimi Yoshiaki, *Comfort Women* 91 (Suzanne O'Brien trans., Columbia Univ. Press 2000) (1995).

The Japanese government destroyed many relevant documents at the end of World War II. Cpt. ¶ 40; App. 115a-116a. It steadfastly denied involvement in the enslavement and forced prostitution of the comfort women until 1992, when Japan's Chief Cabinet Secretary admitted for the first time the government's role in operating the comfort stations. Cpt. ¶ 70; App. 127a. Even then, Japan continued to deny any role in "recruiting" the comfort women, claiming the comfort stations were the work of "private entrepreneurs." Cpt. ¶¶ 68-70; App. 126a-127a. Other than its Chief Cabinet Secretary's belated expression of "deep remorse," Japan has made no reparations, acknowledged no liability, and undertaken no prosecutions relating to the abduction, enslavement, and forced prostitution of the comfort women. Cpt. ¶¶ 70-71, App. 127a.

After the Japanese government's operation of the comfort stations was revealed, Petitioners sued Japan, on behalf of themselves and other comfort women, in the United States District Court for the District of Columbia, under the Alien Tort Claims Act, 28 U.S.C. § 1350. They invoked the jurisdiction of the district court pursuant to 28 U.S.C. §§ 1331, 1350, 1367, and 1605(a).

The district court dismissed Petitioners' claims for lack of subject matter jurisdiction. The United States Court of Appeals for the District of Columbia Circuit affirmed, holding that the FSIA's commercial activity exception to sovereign immunity did not apply to claims based on pre-

1952 conduct, and that sovereign immunity therefore barred Petitioners' claims.

REASONS FOR GRANTING THE WRIT

The D.C. Circuit's holding that the FSIA does not apply to claims based on pre-1952 conduct directly conflicts with the holding of the United States Court of Appeals for the Ninth Circuit in *Altmann v. Republic of Austria,* 317 F.3d 954 (9th Cir. 2002), *cert. granted,* 124 S. Ct. 46 (Sept. 30, 2003). The Court granted certiorari in *Altmann* on the following question, which the Ninth Circuit answered in the affirmative: "Does the expropriation exception of the [FSIA] afford jurisdiction over claims against foreign states based on conduct that occurred before the United States adopted the restrictive theory of sovereign immunity in 1952?" Petitioners seek a writ of certiorari here on the two closely related and equally important questions set forth above.

I. The Decision Below Conflicts With The Ninth Circuit's Decision In *Altmann* And With This Court's Retroactivity Jurisprudence.

Until 1952, the State Department ordinarily requested, and our courts usually afforded, immunity from suit to friendly foreign sovereigns. *Verlinden B.V. v. Central Bank of Nigeria,* 461 U.S. 480, 486 (1983).[2] On May 19, 1952, in the "Tate Letter," the State Department announced its adoption of the "restrictive" theory of sovereign immunity,

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[2] The State Department customarily sought the application of sovereign immunity in a particular case by filing a "suggestion of immunity" with the court whose jurisdiction was at issue. *Verlinden,* 461 U.S. at 487.

which provided for immunity in cases involving a foreign sovereign's public acts but not those involving its commercial acts. *Id.* at 487.

Because "the governing standards were neither clear nor uniformly applied," *id.* at 488, Congress, in 1976, passed the FSIA, which "contains a comprehensive set of legal standards governing claims of immunity in every civil action against a foreign state." *Id.* To help ensure uniformity, the FSIA provides that, "Claims of foreign states to immunity should henceforth be decided by courts of the United States and of the States in conformity with the principles set forth in this chapter." 28 U.S.C. § 1602.

The FSIA essentially codified the restrictive theory of sovereign immunity enunciated in the Tate Letter. *Verlinden,* 461 U.S. at 488. Under the FSIA, foreign states are not immune from actions in federal and state courts if the actions fall within the exceptions to sovereign immunity enumerated in sections 1605 and 1607 of the FSIA. *Id.* at 488-89. The FSIA's exception for "commercial activity" of a foreign sovereign, 28 U.S.C. § 1605(a)(2), is central to this case.[3]

The D.C. Circuit's decision in this case that the FSIA's commercial activity exception does not apply to

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[3] Although not specifically alleged in Petitioners' Complaint, the exception for tortious acts of foreign states on American soil, 28 U.S.C. § 1605(a)(5), also applies to some of Japan's conduct at issue here. Petitioners raised § 1605(a)(5) at oral argument before the district court, and should, on remand, be permitted to amend their complaint to allege violation of this section. *See Simplex Time Recorder Co. v. Sec'y of Labor*, 766 F.2d 575, 585 (D.C. Cir 1985) (citing *Foman v. Doris*, 371 U.S. 178, 182 (1962)).

claims based on pre-1952 conduct conflicts with the Ninth Circuit's decision in *Altmann* that the FSIA's expropriation exception to sovereign immunity, 28 U.S.C. § 1605(a)(3), *does* apply to claims based on pre-1952 conduct. *Compare* App. 16a ("the commercial activity exception to the FSIA does not apply retroactively to events . . . occurring before May 19, 1952"), *with Altmann*, 317 F.3d at 967 ("we hold that application of the FSIA to the pre-1952 actions of the Republic of Austria is not impermissibly retroactive"). The United States also recognizes this conflict: in its Brief for the United States as Amicus Curiae Supporting Petitioners in *Republic of Austria v. Altmann*, 03-13 (Nov. 2003), the United States cites *Hwang Geum Joo v. Japan* extensively for support when urging the Court to reject *Altmann*.[4]

The D.C. Circuit attempts to distinguish *Altmann* on two bases: the 1951 Treaty with Japan and the 1949 "Bernstein" letter. App. 10a, 11a. Neither distinction is persuasive. Although the D.C. Circuit states that "there was no similar treaty with Germany or Austria, and therefore no similar settled expectation" of immunity, App. 11a, in fact there was a series of post-war treaties similar to the 1951 Treaty with Japan that dealt with restitution and reparations for the acts of the Nazi regime.[5] The panel also mistakenly

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[4] Similarly, the first case cited to illustrate a conflict between the circuits by Austria in its *Petition for A Writ of Certiorari* at 10, *cert. granted* 124 S. Ct. 46 (Sept. 30, 2003), is *Hwang Geum Joo v. Japan*.

[5] In fact, Japan itself acknowledges in its discussion of the D.C. Circuit opinion that "the United States *did* enter into treaties with Germany and Austria." Brief for Amicus Curiae Japan in Support of

(continued...)

asserted that the State Department position embodied in the Bernstein letter applied only to the Nazis and that "we are not aware of, any similar statement of policy regarding the alleged acts of Japan in this case." App. 12a. In fact, the United States issued a series of declarations, referred to in the Bernstein letter itself, that were directed at all enemy nations, including Japan. *See, e.g.,* "Declaration Regarding Forced Transfers of Property in Enemy Controlled Territory," 8 Dep't State Bull. 21 (Jan. 9, 1943). Moreover, the United States consistently condemned Japan's World War II activities. *See, e.g.,* 8 Dep't State Bull. 49 - 55 (Jan. 16, 1943)("No other civilized society sells its young girls to panderers with such openness ... Japanese soldiers have made 'Japanese' a synonym for murder, torture, and rape"). Finally, the Bernstein letter was not the only factor on which the Ninth Circuit relied in reaching its conclusion.

The question whether the FSIA's enumerated exceptions to sovereign immunity apply to claims based on pre-1952 conduct is an important one, as the Court implicitly recognized when it granted certiorari in *Altmann.* Indeed, as the Court has noted, "Congress expressly acknowledged 'the importance of developing a uniform body of law' concerning the amenability of a foreign sovereign to suit in United States courts" when it enacted the FSIA. *First Nat'l City Bank v. Banco Para El Comercio Exterior de Cuba,* 462 U.S. 611, 622 n.11 (1983) (quoting H.R. Rep. No. 94-1487, p.32); *see also Verlinden,* 461 U.S. at 489 (same). The conflicting decisions of the federal courts of appeals regarding the

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[5](...continued)
Petitioners, at 25, n. 5, *Republic of Austria v. Altmann*, 03-13 (Nov. 2003) (emphasis added) (citing treaties).

application of the FSIA to claims based on pre-1952 conduct have destroyed the uniformity Congress sought to create by enacting the FSIA. The Court should grant this petition to reconcile the conflict among the Circuits and to restore the uniformity the FSIA was designed to promote.

In addition to conflicting with the decision in *Altmann*, the decision below cannot be reconciled with this Court's retroactivity jurisprudence. In *Landgraf v. USI Film Products*, 511 U.S. 244, 274 (1994), the Court observed: "We have regularly applied intervening statutes conferring or ousting jurisdiction, whether or not jurisdiction lay when the underlying conduct occurred or when the suit was filed." *See also id.* at 292 (Scalia, J., concurring) (noting the Court's "consistent practice of giving immediate effect to statutes that alter a court's jurisdiction").

Jurisdictional statutes regulate primarily the power of courts, rather than the actions of parties. Therefore, "the relevant event for retroactivity purposes is the moment at which that power is sought to be exercised," rather than the moment of the conduct from which the case arises. *Id.* at 293 (Scalia, J., concurring). As Justice Scalia reasoned in *Landgraf*:

> Our jurisdiction cases are explained, I think, by the fact that *the purpose of provisions conferring or eliminating jurisdiction is to permit or forbid the exercise of judicial power – so that the relevant event for retroactivity purposes is the moment at which that power is sought to be exercised.* Thus, applying a jurisdiction-eliminating statute to undo past judicial action would be applying it

> retroactively; but applying it to prevent any judicial action after the statute takes effect is applying it prospectively.

Id. (emphasis added). *See also Republic Nat'l Bank of Miami v. United States*, 506 U.S. 80, 100 (1992) (Thomas, J., concurring) ("statutes affecting jurisdiction speak to the power of the court rather than to the rights or obligations of the parties").

The FSIA does not alter the substantive rights or obligations of the parties, but merely regulates where cases against foreign sovereigns may be brought.[6] As the Court has noted, "The language and history of the FSIA clearly establish that the Act was not intended to affect the substantive law determining the liability of a foreign state or instrumentality." *First Nat'l City Bank*, 462 U.S. at 620; *see also Altmann*, 317 F.3d at 966 ("application of the FSIA infringes on no right held at the time the acts at issue occurred").

Because it addresses the jurisdiction of courts rather than the substantive rights of litigants, the FSIA applies in all cases against foreign sovereigns decided subsequent to its enactment. *See Landgraf*, 511 U.S. at 274 ("We have regularly applied intervening statutes conferring or ousting

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[6] An expectation of immunity is not a substantive right that will prevent retroactive application of a statute. *See United States v. Alabama*, 362 U.S. 602, 604 (1960) (applying provision authorizing civil rights actions against a State in case filed before provision's enactment); *see also Verlinden*, 461 U.S. at 486 (foreign sovereign immunity is not a right but "a matter of grace and comity on the part of the United States").

jurisdiction"); *Altmann,* 317 F.3d at 967 (applying FSIA to claims based on pre-1952 conduct); *Creighton Ltd. v. Gov't of Qatar,* 181 F.3d 118, 123-34 (D.C. Cir. 1999) (applying FSIA's arbitration exception to claims based on conduct pre-dating its enactment); *Haven v. Republic of Poland,* 68 F. Supp. 2d 943, 945 (N.D. Ill. 1999) (applying FSIA to claims based on events prior to and during World War II); *Crist v. Republic of Turkey*, 995 F. Supp. 5, 9 (D.D.C. 1998). *But see* App. 16a; *Carl Marks & Co. v. U.S.S.R.,* 841 F.2d 26, 27 (2d Cir. 1988); *Jackson v. People's Republic of China,* 794 F.2d 1490, 1497 (11th Cir. 1986).

Indeed, in *Verlinden,* the Court recognized that the FSIA applied to a case arising from Nigeria's alleged anticipatory breach, *in September 1975,* of a letter of credit. 461 U.S. at 483. The court of appeals in *Verlinden* had held that the FSIA unconstitutionally expanded the jurisdiction of federal courts beyond the bounds of Article III. This Court reversed, finding the Act constitutional. Notwithstanding the fact that the conduct complained of in *Verlinden* occurred prior to the 1976 passage of the FSIA, the Court assumed the FSIA applied and remanded for consideration of "whether jurisdiction exists under the Act." *Id.* at 498. Here, as in *Verlinden,* the conduct at issue occurred prior to 1976. The Court's remand in *Verlinden* for application of the FSIA suggests that the court below erred in concluding that the FSIA's commercial activity exception could not apply here.[7]

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[7] In addition, the policy discussed in the Tate Letter was applied by the State Department to requests for immunity made after 1952, regardless of when the underlying cause of action accrued. For example, in a suit brought against Korea for damage to a steamship

(continued...)

The Court's decision in *Hughes Aircraft Co. v. United States,* 520 U.S. 939 (1997), is not to the contrary. In *Hughes*, the Court held that a 1986 amendment to the False Claims Act that eliminated a full defense based on pre-suit disclosure to the government should not be applied retroactively. Prior to the 1986 amendment, there was no private cause of action based on submission of false claims to the government where the government knew of the claims' falsity. *Id.* at 941. After the 1986 amendment, the government's possession of the relevant facts no longer precluded all private *qui tam* actions. *Id.* Thus, the 1986 amendment substantively amended the False Claims Act to create a cause of action where none had previously existed.

Unlike the provision at issue in *Hughes,* the FSIA does not create or eliminate any substantive causes of action: trafficking in women and slavery were unlawful and actionable before the FSIA's enactment and remain unlawful and actionable today. The FSIA merely addresses *which* courts may entertain cases alleging conduct by foreign

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[7](...continued)
sustained in 1951, the State Department applied its new policy and "declined to make the requested suggestion of immunity from suit ... [as] it does not appear the claim rests upon acts of a purely governmental character." *New York & Cuba Mail S.S. Co. v. Republic of Korea*, 132 F. Supp. 684, 686 (S.D.N.Y. 1955). Likewise, when analyzing a counterclaim brought against China for a 1948 loan default, the Court discussed the import of the Tate Letter without regard to the fact that the conduct at issue occurred before 1952. *See Nat'l City Bank of N.Y. v. Republic of China*, 348 U.S. 356, 360-61, 364 (1955).

sovereigns that violates *other* laws.[8] The FSIA, therefore, properly applies to all suits decided after its enactment. *See Hughes,* 520 U.S. at 951 ("Statutes merely addressing *which* court shall have jurisdiction to entertain a particular cause of action can fairly be said merely to regulate the secondary conduct of litigation and not the underlying primary conduct of the parties.") (emphasis in original; citing *Landgraf,* 511 U.S. at 275, 291).

Because the D.C. Circuit's holding that the FSIA's commercial activity exception does not apply to claims based on pre-1952 conduct conflicts with the Ninth Circuit's holding in *Altmann* and with this Court's retroactivity jurisprudence, the Court should grant this petition. In the alternative, the Court should hold this petition pending a decision in *Altmann.*[9]

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[8] Japan was amenable to suit for its commercial acts in other courts, as almost all other nations had already adopted the restrictive theory of immunity by 1952. *See* Tate Letter; Jennifer A. Gergen, *Human Rights and the Foreign Sovereign Immunities Act*, 36 Va. J. Int'l L. 765, 769 (1996). In fact, by the time of the Tate Letter, the United States had ceased claiming immunity in foreign courts and subjected itself to contract and tort cases. *See* Tate Letter at 2; Gergen at 769.

[9] The United States has similarly asked the Court to hold the petitions for certiorari filed in *Garb v. Republic of Poland* and *Whiteman v. Austria*, 72 Fed. Appx. 850 (2d Cir. 2003), Nos. 03-500 and 03-517. Brief For the United States as Amicus Curiae Supporting Petitioners at 24, n.15, *Republic of Austria v. Altmann*, 03-13 (Nov. 2003). Those petitions also present questions relating to the retroactivity of the FSIA.

II. This Court's Review Is Warranted To Decide The Important Question Whether, Even Absent The FSIA's Commercial Activity Exception, Enemy Nations Are Entitled To Sovereign Immunity From Suits Based On Their Wartime Acts.

The Court first announced the doctrine of foreign sovereign immunity in *The Schooner Exchange v. McFaddon,* 11 U.S. 116 (1812). While observing that "[t]he jurisdiction of the nation within its own territory is necessarily exclusive and absolute [and] susceptible of no limitation not imposed by itself," *id.* at 136, Chief Justice Marshall, writing for the Court, held:

> It seems then to the Court, to be a principle of public law, that national ships of war, entering the port of a *friendly* power open for their reception, are to be considered as exempted by the consent of that power from its jurisdiction.

Id. at 145-46 (emphasis added).

"[F]oreign sovereign immunity is a matter of grace and comity on the part of the United States, and not a restriction imposed by the Constitution." *Verlinden,* 461 U.S. at 486. The immunity traditionally afforded friendly foreign sovereigns in our courts stems from the recognition that "[t]he judicial seizure of the property of a *friendly* state may be regarded as . . . an affront to its dignity and may . . . affect our relations with it." *Republic of Mexico v. Hoffman,* 324 U.S. 30, 35-36 (1945) (emphasis added); *see also Verlinden,* 461 U.S. at 486 ("Until 1952, the State Department ordinarily requested immunity in all actions against *friendly* foreign sovereigns") (emphasis added); *Ex*

Parte Republic of Peru, 318 U.S. 578, 586-87 (1943) (sovereign immunity determination "involves the dignity and rights of a *friendly* sovereign state") (emphasis added). Obviously, considerations of grace, comity, and dignity apply far less, if at all, in actions against enemy nations.

Earlier this year, in *Abrams v. Société Nationale des Chemins de Fer Français,* 332 F.3d 173 (2d Cir. 2003), the Second Circuit addressed the district court's dismissal, on sovereign immunity grounds, of plaintiffs' claims against the French national railroad for its role in transporting Holocaust victims to Nazi death camps during World War II. *Id.* at 174-75. The court of appeals questioned whether sovereign immunity would apply to claims based on wartime crimes of enemy nations:

> [T]he State Department's treatment of ordinary litigation with friendly foreign states in times of peace does not necessarily indicate the position the Department would have taken on claims closely related to war-time crimes of an enemy, such as plaintiffs' claims here.

Id. at 187. The Second Circuit vacated the district court's dismissal of the case and remanded for further proceedings, including an inquiry into the State Department's position during World War II on issues pertaining to sovereign immunity. *Id.* at 188.

In her dissenting opinion in an analogous case, *Princz v. Federal Republic of Germany,* 26 F.3d 1166 (D.C. Cir. 1994), Judge Wald of the D.C. Circuit concluded that sovereign immunity would not shield Germany from liability for crimes perpetrated during World War II:

> The operative question, then, is whether the executive branch would have recommended immunity for the perpetrators of the Holocaust. The intuitive answer is no.
>
> In the mid-1940's, Germany could not, even in its wildest dreams, have expected the executive branch of the United States, as a matter of grace and comity, to suggest immunity for its enslavement and confinement (in three concentration camps) of an American citizen during the Holocaust.

Id. at 1179 (Wald, J., dissenting).

It similarly strains credulity to posit that the State Department would have filed a suggestion of immunity on behalf of the Japanese government during the period from 1931 to 1945, when Petitioners were abducted, enslaved, and forced into prostitution by the Japanese military. As early as 1931, the United States recognized the threat posed by Japan's aggression in East Asia and in the Pacific. *See generally, Chronological History of Certain Major International Events Leading Up To and During World War II With the Ostensible Reasons Advanced For Their Occurrence,* 1931-1944, H.R. Doc. No. 78-541, at 4 (1944). A decade of subsequent events, including Japan's further encroachment into Southeast Asia and the South Seas, led the United States, in 1941, to freeze Japanese assets and terminate discussions concerning occupied Indochina. From 1941 to 1945, the United States and Japan were at war.

Accordingly, even if the FSIA does not apply to cases arising from Japan's actions during this period, sovereign

immunity should still be denied, for it undoubtedly would have been at the time of the relevant events. Absent a suggestion of immunity by the executive branch, our courts would not have granted sovereign immunity to Japan prior to enactment of the FSIA. As Chief Justice Stone observed in 1945, in rejecting Mexico's claim of sovereign immunity where the executive branch had declined to suggest immunity, it is "not for the courts to deny an immunity which our government has seen fit to allow, or to allow an immunity on new grounds which the government has not seen fit to recognize." *Hoffman,* 324 U.S. at 35; *see also The Navemar,* 303 U.S. 68, 74-75 (1938) (rejecting Mexico's claim of sovereign immunity where State Department had declined to suggest immunity).

Although the D.C. Circuit reasoned that "the 1951 Treaty [with Japan] created a settled expectation, left undisturbed by Congress, that Japan would not face suit in the courts of the United States for its actions during World War II," App. 16a, Korea and China, home to the vast majority of the comfort women, were not parties to the 1951 Treaty.[10] Their citizens' claims, therefore, cannot be extinguished by it. *See Flores v. Southern Peru Copper Corp.,* 343 F.3d 140, 162 (2d Cir. 2003) (treaties "are legally binding only on States that become parties to them by consenting to be bound") (citing Lord McNair, *The Law of Treaties* 162 (1961)); *United States v. Yousef,* 327 F.3d 56,

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[10] Moreover, the 1951 Treaty did not purport to close U.S. courts to any claims. The Treaty provided for the seizure of certain Japanese assets to satisfy the claims of allied nationals and the costs of occupation, and in exchange waived reparations claims and claims for direct military costs of occupation. The subsequent treaties signed by China and Korea did not waive the claims of their nationals.

95 n.28 (2d Cir. 2003) ("Only 'ratification' of the treaty causes the treaty to become binding on the signing party.").

In addition, the D.C. Circuit failed to explain how the 1951 Treaty could "create[] a settled expectation" before its ratification. At most, the Treaty could have affected Japan's expectations from September 8, 1951, when it was signed, until May 19, 1952, when the United States adopted the restrictive theory of sovereign immunity later codified in the FSIA. As the Ninth Circuit noted, "To the extent courts have considered the retroactivity of the FSIA, the consensus appears to be that it would encompass events dating back at least as far as the date of [the May 19, 1952 Tate] letter." *Altmann,* 317 F.3d at 962 (citations omitted).

For the reasons set forth in section I, above, Petitioners believe that, like other jurisdictional statutes, the FSIA applies to all cases decided after its enactment. To the extent the Court entertains any doubt that the FSIA applies to cases arising from pre-1952 conduct, the Court should grant this petition to decide whether, even absent the FSIA, enemy nations in general, and Japan in particular, are entitled to absolute immunity from suits based on their wartime acts, particularly when those acts occur on United States soil.[11] In the alternative, because the Court's decision in *Altmann* will

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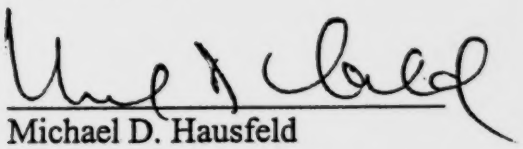
[11] In its amicus brief in *Altmann,* the United States acknowledges that under pre-FSIA law, a foreign sovereign was more susceptible to suit based on conduct or assets located within the United States than to suit based exclusively on "conduct within its own territory." Brief for the United States as Amicus Curiae Supporting Petitioners at 25 & n.17, *Republic of Austria v. Altmann,* 03-13 (Nov. 2003).

likely either resolve or directly implicate this question,[12] the Court should hold this petition pending its decision in *Altmann*.

CONCLUSION

For the foregoing reasons, the Court should grant certiorari on each of the two questions presented by this Petition. In the alternative, the Court should hold this Petition pending decision of the closely related question on which the Court granted certiorari in *Altmann*.

Respectfully submitted,



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[12] *Altmann* held that whether a statute can be applied retroactively depends in part on whether the foreign nation, at the time its conduct took place, "could legitimately expect to receive immunity" for its actions. *See Altmann*, 317 F.3d at 964. Japan, an enemy nation, cannot have reasonably expected immunity in the United States for its wartime trafficking of plaintiffs in U.S. territory.

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Supreme Court, U.S.
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No. 03-

IN THE

Supreme Court of the United States

Hwang Geum Joo, Yuan Zhulin, Lola Tomasa Salinog, Liu Huang A-tau, Kim Boon-sun, Kim Sang Hee, Kim Soon-Duk, Yi Yong Nyo, Kim Bok-Dong, Lu Xiuzhen, Guo Yaying, Zhu Qiaomei, Prescila Bartonico, Narcisa Claveria, Maxima Regala de la Cruz, on behalf of themselves and all others similarly situated,

Petitioners,

v.

Government of Japan,

Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the District of Columbia Circuit

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI

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OPINIONS BELOW

United States Court of Appeals,
District of Columbia Circuit.

HWANG GEUM JOO, et al., Appellants,
v.
JAPAN, Minister Yohei Kono, Minister of Foreign Affairs, Appellee.

No. 01-7169.

Argued Dec. 10, 2002.
Decided June 27, 2003.
Rehearing and Rehearing En Banc Denied Aug. 22, 2003.

Before: GINSBURG, Chief Judge, and SENTELLE and TATEL, Circuit Judges.

Opinion for the Court filed by GINSBURG, Chief Judge.

GINSBURG, Chief Judge:

The appellants are 15 women from China, Taiwan, South Korea, and the Phillippines; they brought this suit against Japan, seeking money damages for having been subjected to sexual slavery and torture before and during World War II. The district court held Japan immune from suit pursuant to the Foreign Sovereign Immunities Act of 1976, 28 U.S.C. §§ 1330, 1602-1611, because it had not waived its immunity and the conduct alleged did not come within the commercial activity exception to the FSIA. The district court also held the suit was barred under the political question doctrine.

We affirm the judgment of the district court. Under the FSIA Japan is entitled to immunity from suit concerning the pre-1952 acts alleged in this case. We reject the appellants' argument that violation of a *jus cogens* norm constitutes a waiver of sovereign immunity.

I. Background

The appellants allege that between 1931 and 1945 the Government of Japan abducted, coerced, or deceived them and a large number of other girls and women from occupied territories to serve as "comfort ***681** women," a euphemism for sex slaves, at so-called "comfort stations" near the front lines of the war, where the women were routinely raped, tortured, beaten, mutilated, and in some cases murdered. The appellants assert that these comfort stations were operated by the Japanese Army, which charged soldiers a fee for access to the women.

Only in 1992 did the Government of Japan acknowledge having had any involvement with the comfort stations, which it had previously attributed to entrepreneurs who employed "voluntary prostitutes." In 2000 the appellants filed a complaint in the district court invoking the Alien Tort Statute, 28 U.S.C. § 1350, and alleging that Japan had violated both positive and customary international law. Japan filed a motion to dismiss the complaint on the ground of sovereign immunity, which motion the district court granted.

The district court determined that its jurisdiction over Japan, if any, must rest solely upon the FSIA. *Hwang Geum Joo v. Japan,* 172 F.Supp.2d 52, 56 (D.D.C.2001). Because that statute was not enacted until 1976, the court first considered

whether the FSIA applies retroactively to the actions alleged in this case. *Id.* at 57-58. The district court did not reach a conclusion on that issue, however, instead holding that, even if the FSIA does govern the plaintiffs' claims, none of the exceptions to sovereign immunity provided in the FSIA applies. *Id.* at 58. The district court rejected the appellants' arguments that Japan had waived its immunity to suit in the United States, either explicitly by agreeing to the Potsdam Declaration - an argument abandoned on appeal - or implicitly by its commission of *jus cogens* violations, and that Japan's activities came within the commercial activity exception to the FSIA, 28 U.S.C. § 1605(a)(2). *Id.* at 64. The district court held in the alternative that the case must be dismissed because it presents a nonjusticiable political question. *Id.* at 67.

II. Analysis

The appellants raise two potential sources of district court jurisdiction over their suit against Japan. First, they argue the commercial activity exception to the FSIA applies retroactively, and Japan's operation of "comfort stations" was a commercial activity. Next, they contend Japan implicitly waived its sovereign immunity by violating *jus cogens* norms. Then, apparently assuming the courts have jurisdiction over Japan, they claim the Alien Tort Statute creates a cause of action for a violation of customary international law. Finally, the appellants argue the political question doctrine is inapplicable to this case.

We hold that the commercial activity exception does not apply retroactively to events prior to May 19, 1952; we therefore do not consider whether the "comfort stations" were a "commercial activity" within the meaning of the FSIA. In

any event, the 1951 Treaty of Peace between Japan and the Allied Powers created a settled expectation on the part of Japan that it would not be sued in the courts of the United States for actions it took during the prosecution of World War II, and the Congress has done nothing that leads us to believe it intended to upset that expectation. As to whether a violation of *jus cogens* norms constitutes an implied waiver of sovereign immunity pursuant to 28 U.S.C. § 1605(a)(1), our holding in *Princz v. Federal Republic of Germany,* 26 F.3d 1166 (D.C.Cir.1994), is dispositive and remains good law; it therefore binds this panel of the court, as the appellants recognize.

We need not decide whether the Alien Tort Statute creates a cause of action because ***682** it clearly does not confer jurisdiction over a foreign sovereign. Nor, because the district court did not have jurisdiction of this case pursuant to the FSIA, need we consider whether the political question doctrine would also bar its adjudication.

A. Retroactive Application of the Commercial Activity Exception to the FSIA

[1] The FSIA, enacted in 1976, "provides the sole basis for obtaining jurisdiction over a foreign state in federal court." *Argentine Republic v. Amerada Hess Shipping Corp.,* 488 U.S. 428, 439, 109 S.Ct. 683, 690, 102 L.Ed.2d 818 (1989); *see Verlinden B.V. v. Central Bank of Nigeria,* 461 U.S. 480, 488, 103 S.Ct. 1962, 1968-69, 76 L.Ed.2d 81 (1983) (FSIA contains "comprehensive set of legal standards governing claims of immunity in every civil action against a foreign state or its political subdivisions, agencies, or instrumentalities"). We have previously laid out at some length the history of the United States' approach to foreign

sovereign immunity in general, culminating in the passage of the FSIA, *see Princz,* 26 F.3d at 1169-71; here we concentrate specifically upon the commercial activity exception.

Prior to 1952, the courts of the United States generally followed the doctrine of "absolute immunity," *see Verlinden,* 461 U.S. at 486, 103 S.Ct. at 1967- 68; Letter from Jack B. Tate, Acting Legal Advisor, Department of State, to Acting Attorney General Philip B. Perlman (May 19, 1952), reprinted in 26 Dept. of State Bull. 984-85 (1952), and in *Alfred Dunhill of London, Inc. v. Cuba,* 425 U.S. 682, 711, 96 S.Ct. 1854, 1869, 48 L.Ed.2d 301 (1976) (Appendix 2 to opinion of White, J.); that is, the courts almost always held a foreign sovereign immune from suit. *See Verlinden,* 461 U.S. at 486, 103 S.Ct. at 1967-68 ("foreign sovereign immunity is a matter of grace and comity on the part of the United States, and not a restriction imposed by the Constitution. Accordingly, this Court consistently has deferred to the decisions of the political branches - in particular, those of the Executive Branch - on whether to take jurisdiction over actions against foreign sovereigns and their instrumentalities"). In 1952 the United States adopted the doctrine of "restrictive immunity," as set out in the Tate Letter and later codified in the FSIA. *See Verlinden,* 461 U.S. at 486-88, 103 S.Ct. at 1967-69. Under that doctrine "immunity is confined to suits involving the foreign sovereign's public acts, and does not extend to cases arising out of a foreign state's strictly commercial acts." *Verlinden,* 461 U.S. at 487, 103 S.Ct. at 1968. This distinction served as the basis for the commercial activity exception in the FSIA, which allows a suit against a foreign sovereign to proceed if:

> the action is based [1] upon a commercial activity carried on in the United States by the foreign state; or [2] upon an

> act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or [3] upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States.

28 U.S.C. § 1605(a)(2). In this case the appellants invoke the first and third conditions, claiming in connection with the former that Japan operated some comfort stations in two occupied territories of the United States, namely, Guam and the Phillippines.

[2] With this background in mind we consider whether 28 U.S.C. § 1605(a)(2) can be applied to events that occurred prior to 1952. This is a two- step inquiry. First, we must consider whether the commercial activity exception to the FSIA has retroactive effect.

> ***683** A statute has retroactive effect when it takes away or impairs vested rights acquired under existing laws, or creates a new obligation, imposes a new duty, or attaches a new disability, in respect to transactions or considerations already past. As we have repeatedly counseled, the judgment whether a particular statute acts retroactively should be informed and guided by familiar considerations of fair notice, reasonable reliance, and settled expectations.

INS v. St. Cyr, 533 U.S. 289, 321, 121 S.Ct. 2271, 2290-91, 150 L.Ed.2d 347 (2001) (internal citations and quotation marks omitted). If we conclude the statute does not have a retroactive effect, then our inquiry ends and we apply the statute to events occurring prior to 1952. If, however, we determine the statute would have a retroactive effect, then we ask whether the "presumption against retroactive legislation that is deeply rooted in our jurisprudence" is overcome because the "Congress has clearly manifested its intent" to

legislate retroactively. *Hughes Aircraft Co. v. United States ex rel. Schumer,* 520 U.S. 939, 946, 117 S.Ct. 1871, 1876, 138 L.Ed.2d 135 (1997) (internal citations and quotation marks omitted).

1. Would the commercial activity exception have retroactive effect?

With respect to the first inquiry, we agree with Japan and the United States that application of the commercial activity exception to events that occurred prior to 1952 would impose new obligations upon, come without fair notice to, and upset the settled expectations of, foreign sovereigns. We further agree with the United States that the Tate Letter shows the United States clearly changed its position in 1952 when it adopted the doctrine of restrictive immunity. Theretofore a foreign sovereign justifiably would have expected any suit in a court in the United States-whether based upon a public or a commercial act-to be dismissed unless the foreign sovereign consented to the suit. [FN*] As the Eleventh Circuit noted in a case involving a suit against the People's Republic of China for payment of defaulted bearer bonds issued by the Imperial Chinese Government in 1911:

> FN* Appellants argue that absolute immunity was generally accorded only to "friendly" foreign sovereigns in the pre-1952 era, *Verlinden,* 461 U.S. at 486, 103 S.Ct. at 1967-68, and that the State Department and courts would not have accorded Japan such status considering its posture in World War II. The Executive Branch, however, specifically decided to resolve all war-related claims against Japan through inter-governmental negotiations, *see infra*

> pages 684-685, and pre-FSIA courts would have considered themselves bound by a recommendation to accord Japan immunity from suit. *See, e.g., Republic of Mexico v. Hoffman,* 324 U.S. 30, 35, 65 S.Ct. 530, 533, 89 L.Ed. 729 (1945) ("It is therefore not for the courts to deny an immunity which our government has seen fit to allow, or to allow an immunity on new grounds which the government has not seen fit to recognize").

> [T]o give the [FSIA] retrospective application to pre-1952 events would interfere with antecedent rights of other sovereigns (and also with antecedent principles of law that the United States followed until 1952). It would be manifestly unfair for the United States to modify the immunity afforded a foreign state in 1911 by the enactment of a statute nearly three quarters of a century later.

Jackson v. People's Republic of China, 794 F.2d 1490, 1497-98 (1986); *accord Carl Marks & Co., Inc. v. Union of Soviet Socialist Republics,* 841 F.2d 26, 27 (2d Cir.1988) (per curiam) ("Such a retroactive application of the FSIA would affect adversely the USSR's settled expectation, rising to the level of an antecedent right, of immunity from suit in American ***684** courts") (citations omitted). We conclude that, because Japan had a settled expectation in the 1930s and 1940s that its commercial activities would not be subject to suit in a court of the United States, application of the commercial activity exception of the FSIA to acts occurring then would clearly be retroactive in effect.

For the contrary implication the appellants invoke a dictum in *Princz*. There we considered the possibility that application of the FSIA to pre-1952 events might not be of "genuinely retroactive effect," 26 F.3d at 1170 (internal

citations and quotation marks omitted), because the statute is jurisdictional rather than substantive in nature and therefore "would just remove the bar of sovereign immunity to the plaintiff's vindicating his rights under [the substantive] law." *Id.* at 1171. We based this suggestion upon *Landgraf v. USI Film Products,* 511 U.S. 244, 274, 114 S.Ct. 1483, 1501-02, 128 L.Ed.2d 229 (1994), quoting *Hallowell v. Commons,* 239 U.S. 506, 508, 36 S.Ct. 202, 203, 60 L.Ed. 409 (1916), in which the Supreme Court had remarked that a statute affecting jurisdiction "takes away no substantive right, but simply changes the tribunal that is to hear the case."

The Supreme Court has since clarified the situation in *Hughes Aircraft,* where the issue was whether a 1986 amendment expanding the jurisdiction of the *qui tam* provision of the False Claims Act, 31 U.S.C. § 3730(b), could be applied to events occurring prior to 1986. 520 U.S. at 941-42, 117 S.Ct. at 1873-74. The Court held that, although the amendment affected only jurisdiction, its application in a suit concerning pre-enactment events would still have a retroactive effect:

> The 1986 amendment ... does not merely allocate jurisdiction among forums. Rather, it *creates* jurisdiction where none previously existed; it thus speaks not just to the power of a particular court but to the substantive rights of the parties as well. Such a statute, even though phrased in "jurisdictional" terms, is as much subject to our presumption against retroactivity as any other.

Id. at 951, 117 S.Ct. at 1878 (emphasis in original). The commercial activity exception to the FSIA, by qualifying what previously had been the absolute immunity of foreign sovereigns, also "creates jurisdiction where none previously existed" and therefore affects the substantive rights of the concerned parties.

We recognize the Ninth Circuit has recently held that the expropriation exception to the FSIA, 28 U.S.C. § 1605(a)(3), may be applied retroactively to activities of the German and Austrian governments in the 1930s and 1940s. *See Altmann v. Republic of Austria,* 317 F.3d 954 (2002). The Ninth Circuit reasoned "that the Austrians could not have had any expectation, much less a settled expectation, that the State Department would have recommended immunity as a matter of 'grace and comity' for the wrongful appropriation of Jewish property." *Id.* at 965.

The decisions of the Ninth Circuit are, of course, not binding on this court. Regardless whether we would follow the *Altmann* decision, we do not find its reasoning applicable to this case because of the 1951 Treaty of Peace with Japan signed by Japan and the Allied Powers. 3 U.S.T. 3169. As the United States represents in its brief as amicus curiae, the Treaty "embodies the foreign policy determination of the United States that all claims against Japan arising out of its prosecution of World War II are to be resolved through intergovernmental settlements." We agree that the Treaty manifests the parties' intent to resolve matters arising from World War II without involving the courts ***685** of the United States (or of any signatory nation). In any event, the interpretation of the Treaty offered by the United States is a reasonable one. *See Sumitomo Shoji Am., Inc. v. Avagliano,* 457 U.S. 176, 184-85, 102 S.Ct. 2374, 2379, 72 L.Ed.2d 765 (1982) ("Although not conclusive, the meaning attributed to treaty provisions by the Government agencies charged with their negotiation and enforcement is entitled to great weight").

Article 14 of the Treaty expressly waives "all ... claims of the Allied Powers and their nationals arising out of any actions

taken by Japan and its nationals in the course of the prosecution of the war" in return for a reciprocal waiver of claims by Japan and the right of the Allied Powers to seize Japanese assets within the Allies' respective jurisdictions. The Treaty further provides that Japan would resolve the war-related claims of other United Nations member states and their nationals "on the same or substantially the same terms," that is, through intergovernmental agreements, *see* Art. 26, as in fact it did. *See* Treaty of Peace Between the Republic of China and Japan, April 28, 1952, 138 U.N.T.S. 3; *see also* Agreement of the Settlement of Problems Concerning Property and Claims on the Economic Co-operation Between Japan and the Republic of Korea, June 22, 1965, 583 U.N.T.S. 173. As a result, Japan could not have expected to be sued in a court of the United States by either an Allied national or a Chinese or Korean national for a claim arising out of World War II because the Allied Powers had respectively waived the claims of their nationals and expressed a clear policy of resolving the claims of other nationals through government-to-government negotiation. As a matter of foreign policy it would be odd indeed for the United States, on the one hand, to waive all claims of its nationals against Japan and, on the other hand, to allow non-nationals to proceed against Japan in its courts. Because there was no similar treaty with Germany or Austria, and therefore no similar settled expectation, the opinion in *Altmann* is not relevant to the present case.

Altmann is not relevant to the present case for a second reason. In 1949 the State Department had issued a letter specifically stating that

> The policy of the Executive, with respect to claims asserted in the United States for the restitution of identifiable property (or compensation in lieu thereof) lost through

> force, coercion, or duress as a result of Nazi persecution in Germany, is to relieve American courts from any restraint upon the exercise of their jurisdiction to pass upon the validity of the acts of Nazi officials.

Altmann, 317 F.3d at 966 (quoting Letter from Jack B. Tate, Acting Legal Advisor, Department of State, to the Attorneys for the plaintiff in Civil Action No. 31-555 (S.D.N.Y.), *reprinted in Bernstein v. NV Nederlandsche- Amerikaansche,* 210 F.2d 375, 375-76 (2d Cir.1954) (per curiam)). Appellants do not point out, and we are not aware of, any similar statement of policy regarding the alleged acts of Japan in this case. The lack of such a statement not only distinguishes this case from *Altmann*; it also gives us all the more reason to believe the Executive wanted to handle claims against Japan arising out of World War II solely at the level of inter-governmental negotiations.

2. Did the Congress clearly intend to legislate retroactively?

Because the commercial activity exception would, if applied to events before 1952, upset Japan's settled expectations, we must determine whether the Congress manifested a clear intent to overcome the presumption against retroactive legislation. We find no clear indication the Congress***686** intended 28 U.S.C. § 1605(a)(2) to apply to events occurring prior to 1952. The appellants point out, as we observed *obiter* in *Princz,* that the decision of the Congress, concurrent with the passage of the FSIA, to delete from 28 U.S.C. § 1332 the provision for diversity jurisdiction over a suit brought by a United States citizen against a foreign government might suggest the FSIA was intended to have retroactive effect - "[u]nless one is to infer that the Congress intentionally but silently denied a federal forum for all suits against a foreign sovereign arising under federal law that were filed after

enactment of the FSIA but based upon pre-FSIA facts." 26 F.3d at 1170. This point remains valid as applied to events occurring between 1952 and 1976. The Congress's decision to amend 28 U.S.C. § 1332 cannot provide a basis, however, for altering sovereign immunity as it existed prior to 1952. The most that can be said is that in enacting the FSIA the Congress intended to incorporate the doctrine of restrictive immunity into federal law, not that the doctrine be applied to events that occurred before the United States first adopted it.

The appellants' last argument for retroactivity is based upon a sentence in the preamble of the FSIA: "Claims of foreign states to immunity should henceforth be decided by courts of the United States and of the States in conformity with the principles set forth in this chapter." 28 U.S.C. § 1602. In *Princz* we observed that this statement "suggests that the FSIA is to be applied to all cases decided after its enactment, i.e. regardless of when the plaintiff's cause of action may have accrued." 26 F.3d at 1170. The preambular sentence falls far short, however, of stating the "clear intent" of the Congress that the statute be applied retroactively to events occurring before 1952. We agree with the United States that the most probable meaning of the sentence is that the State Department would no longer consider petitions for sovereign immunity - which it had done routinely until 1952, when it issued the Tate Letter, and sometimes thereafter, *see Verlinden*, 461 U.S. at 487, 103 S.Ct. at 1968 - because henceforth the question of immunity would be addressed solely by the courts applying the new statute.

We conclude that the commercial activity exception of the FSIA, 28 U.S.C. § 1605(a)(2), does not apply retroactively to events that predate the Tate Letter. Therefore, we need not consider whether the acts alleged in this case constitute a

"commercial activity" within the meaning of 28 U.S.C. § 1605(a)(2).

B. Violation of a *Jus Cogens* Norm as a Waiver of Sovereign Immunity

[3] The appellants argue that Japan impliedly waived its sovereign immunity by violating *jus cogens* norms against sexual trafficking. "A *jus cogens* norm is a principle of international law that is accepted by the international community of States as a whole as a norm from which no derogation is permitted." *Princz,* 26 F.3d at 1173 (internal citations and quotation marks omitted). In *Princz,* however, this court soundly rejected that argument when we construed the "intentionality requirement implicit in" the waiver provision of the FSIA, 28 U.S.C. § 1605(a)(1), to require "the foreign government's having at some point indicated its amenability to suit." 26 F.3d at 1174. And a sovereign cannot realistically be said to manifest its intent to subject itself to suit inside the United States when it violates a *jus cogens* norm outside the United States. *See id.*

The appellants therefore argue that we should revisit our decision in *Princz* due to intervening developments in international law. There is no need to revisit *Princz,* ***687** however; the fundamental premise of that decision - that a court cannot create a new exception to the general rule of immunity under the guise of an "implied waiver" - remains sound. *See id.* at 1174 n. 1 ("something more nearly express is wanted before we impute to the Congress an intention that the federal courts assume jurisdiction over the countless human rights cases that might well be brought by the victims of all the ruthless military juntas, presidents-for-life, and murderous dictators of the world, from Idi Amin to Mao

Zedong"). No Supreme Court or circuit case has questioned this court's interpretation of 28 U.S.C. § 1605(a)(1) with respect to the violation of a *jus cogens* norm; indeed, two other circuit courts have since followed it, *see Sampson v. Federal Republic of Germany,* 250 F.3d 1145, 1156 (7th Cir.2001); *Smith v. Socialist People's Libyan Arab Jamahiriya,* 101 F.3d 239 (2d Cir.1996); and this panel is in any event bound by it.

C. The Alien Tort Statute

[4] The appellants maintain, and Japan denies, that the Alien Tort Statute, 28 U.S.C. § 1350, creates a cause of action for a violation of customary international law. *Compare, e.g., Kadic v. Karadzic,* 70 F.3d 232 (2d Cir.1995), *with Al Odah v. United States,* 321 F.3d 1134, 1145-49 (D.C.Cir.2003) (Randolph, J., concurring). We need not reach this question because, as Japan and the United States point out, whatever else the Alien Tort Statute might do, it does not provide the courts with jurisdiction over a foreign sovereign. Only the FSIA can provide such jurisdiction. *See Amerada Hess,* 488 U.S. at 438, 109 S.Ct. at 690 ("We think that Congress' decision to deal comprehensively with the subject of foreign sovereign immunity in the FSIA, and the express provision in § 1604 that 'a foreign state shall be immune from the jurisdiction of the courts of the United States and of the States except as provided in sections 1605-1607,' preclude a construction of the Alien Tort Statute that permits the instant suit"); *Verlinden,* 461 U.S. at 488, 103 S.Ct. at 1968-69. The appellants, in a footnote to their reply brief, acknowledge what they could hardly deny. Having found no jurisdictional predicate under the FSIA, we have no need to determine whether the ATS creates a cause of action for a violation of customary international law.

III. Conclusion

In sum, we hold only three things: (1) the commercial activity exception to the FSIA does not apply retroactively to events, such as those alleged in this case, occurring before May 19, 1952, the date of the Tate Letter; (2) in any event, the 1951 Treaty created a settled expectation, left undisturbed by the Congress, that Japan would not face suit in the courts of the United States for its actions during World War II; and (3) a violation of *jus cogens* norms does not constitute an implied waiver of sovereign immunity under the FSIA. Much as we may feel for the plight of the appellants, the courts of the United States simply are not authorized to hear their case. The judgment of the district court dismissing this case is, accordingly,

Affirmed.

United States District Court,
District of Columbia.

HWANG GEUM JOO, et al., Plaintiffs,
v.
JAPAN, Defendant.

No. Civ.A. 00-02233(HHK).

Oct. 4, 2001.

MEMORANDUM OPINION

KENNEDY, District Judge.

This case is brought by fifteen foreign women, on behalf of themselves and others similarly situated, who allege that they were victims of sexual slavery and torture at the hands of the Japanese military before and during World War II. The fifteen named plaintiffs allege that this conduct occurred throughout Japanese-occupied Asia, including specifically in Japan, Korea, *55 China, the Philippines, Taiwan, Burma, Singapore, and the Dutch East Indies. Defendant Japan has moved to dismiss the complaint under Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6). [FN1] Upon consideration of Japan's motion to dismiss, plaintiffs' opposition thereto, and the record of this case, the court concludes that Japan's motion must be granted.

FN1. Japan's motion to dismiss the complaint asserts several grounds for dismissal: 1) that Japan enjoys sovereign immunity; 2) that the court lacks personal jurisdiction over Japan; 3) that this action presents a

political question; 4) that even if jurisdiction exists this case should be dismissed on the grounds of forum nonconveniens; 5) that the international comity of nations requires dismissal; 6) that the statute of limitations has expired; and 7) that under the Alien Tort Claims Act these claims should be dismissed. Because Japan enjoys sovereign immunity and this action, in any event, presents a non-justiciable dispute, dismissal is required under Federal Rules of Civil Procedure 12(b)(1). Therefore, the court does not reach Japan's other grounds for dismissal.

I. BACKGROUND

In the years leading up to and during World War II the world witnessed some of the worst atrocities ever committed by mankind. Fascist regimes spread virtually unchecked throughout the globe perpetrating such evil that the phrase "crimes against humanity" is hardly an adequate description. The international community has spent much of the last half century attempting to come to terms with these events. Indeed, in the last decade alone many steps were taken to obtain compensation for the victims. Much of this attention, however, has focused exclusively on the conduct of the Nazi regime in Europe.

Although forgotten by many in the Western Hemisphere, Asia was certainly not immune from the perils of fascism during this era. This case focuses attention on the egregious conduct of Japan during its conquest of Asia-- conduct that included sexual slavery and mass rape on an institutional scale. Plaintiffs allege that along with approximately 200,000 other women they were forced into sexual slavery by the

Japanese Army between 1931 and 1945. These women, referred to as "comfort women," were recruited through forcible abductions, deception, and coercion. Once captured by the Japanese military they were taken to "comfort stations." "Comfort stations" were facilities seized or built by the military near the front lines specifically to house "comfort women." While at these facilities the women were repeatedly raped-- often by as many as thirty or forty men a day--tortured, beaten, mutilated, and sometimes murdered. The women were denied proper medical attention, shelter, and nutrition. Many of the women endured this brutal treatment for years. Plaintiffs estimate that only 25% to 35% of the "comfort women" survived the war, and those who did suffered health effects, including damage to reproductive organs and sexually transmitted diseases.

Plaintiffs assert that this conduct "was a systematic and carefully planned system ordered and executed by the Japanese government." Compl. ¶ 50. The "comfort stations" were for use by the Japanese military, and were regulated by the Japanese Army. Soldiers were charged a fee for access. The price charged depended on the woman's nationality, and at least a portion of the revenue went to the military. A soldier's length of stay and time of visit were determined based upon his rank. The "comfort women" were treated as mere military supplies, and were even catalogued on supply lists under the heading of "ammunition."

The scope of this "premeditated master plan" to enslave and rape thousands of ***56** women was immense, and no doubt "required the deployment of the vast infrastructure and resources that were at the government's disposal, including soldiers and support personnel, weapons, all forms of land

and sea transportation, and engineering and construction crews and material." Compl. ¶ ¶ 1, 56. In the decades after the war, however, Japan largely ignored and denied allegations concerning the "comfort women" system. Not until 1992 did the Japanese government officially acknowledge some involvement in the operation of "comfort stations." Since that time several officials have expressed their apologies for Japan's involvement, but the Japanese government has not taken full responsibility for its actions, and has not paid reparations to the "comfort women." Plaintiffs therefore filed this lawsuit seeking compensation for the inhumane treatment they experienced.

II. ANALYSIS

[1][2] Because this suit is brought against Japan, jurisdiction is premised exclusively on the Foreign Sovereign Immunities Act ("FSIA"), 28 U.S.C. § 1602 *et seq.* *See Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 434, 109 S.Ct. 683, 102 L.Ed.2d 818 (1989) ("We think that the text and structure of the FSIA demonstrate Congress' intention that the FSIA be the sole basis for obtaining jurisdiction over a foreign state in our courts."). In the FSIA Congress mandated presumptive immunity for foreign nations from lawsuits brought in the United States. However, the FSIA also provides several exceptions to this general grant of immunity. *See* 28 U.S.C. §§ 1605-1607. After the defendant has produced prima facie evidence supporting its entitlement to immunity, "the burden of going forward ... shift [s] to the plaintiff to produce evidence establishing that the foreign state is not entitled to immunity." H.R.Rep No. 94-1487, at 17, U.S.Code Cong. & Admin.News 1976, p. 6604 (1976). The defendant then has the ultimate burden of proving immunity. *See, e.g.,*

Transamerican S.S. Corp. v. Somali Democratic Republic, 767 F.2d 998, 1002 (D.C.Cir.1985). When "the defendant challenges only the legal sufficiency of the plaintiff's jurisdictional allegations, then the district court should take the plaintiff's factual allegations as true and determine whether they bring the case within any of the exceptions to immunity invoked by the plaintiff." *Phoenix Consulting, Inc. v. Republic of Angola,* 216 F.3d 36, 40 (D.C.Cir.2000).

The defendant in this case, Japan, is presumptively immune from suit under the FSIA because it is a foreign state. In their papers plaintiffs argue that two exceptions to the FSIA apply. [FN2] The complaint specifically alleges that Japan "waived its immunity as to the claims of the 'Comfort Women' as described in *5728 U.S.C. § 1605(a)(1)" and that "the planning, establishment and operation of a network of 'comfort houses' is a commercial activity that is not subject to sovereign immunity pursuant to 28 U.S.C. § 1605(a)(2)." Compl. § 5. Before addressing these two exceptions, it is appropriate to discuss briefly the threshold issue of whether the FSIA applies to events--such as the ones that are the subject of plaintiffs' complaint--which occurred before 1952.

FN2. At oral argument on the motion to dismiss, held two months after briefing concluded, plaintiffs for the first time sought to invoke an additional exception--the noncommercial tort exception contained in 28 U.S.C. § 1605(a)(5). The court will not consider the application of this exception. It was neither mentioned in the complaint nor raised in any of the papers filed in opposition to Japan's motion to dismiss. Moreover, it was not raised in plaintiffs' Motion for Declaratory Judgment seeking a

declaration that Japan could not claim sovereign immunity in its defense of this suit. Like the complaint, this filing asserted that Japan waived its immunity under § 1605(a)(1), and the third clause of § 1605(a)(2). Therefore, because the noncommercial tort exception was raised for the first time at oral argument, it will not be considered. *Cf. Corson & Gruman Co. v. NLRB,* 899 F.2d 47, 50 n. 4 (D.C.Cir.1990) ("We require petitioners and appelants to raise all of their arguments in the opening brief to prevent 'sandbagging' of appellees and respondents and to provide opposing counsel the chance to respond.")

A. Retroactive Application of the FSIA

Until 1952 foreign sovereigns were granted immunity at the discretion of the executive branch. The State Department generally granted immunity to friendly foreign sovereigns in all actions brought in United States courts. *See Verlinden B.V. v. Central Bank of Nigeria,* 461 U.S. 480, 486, 103 S.Ct. 1962, 76 L.Ed.2d 81 (1983). In 1952, Jack B. Tate, then-Acting Legal Adviser, Department of State, wrote what is now known as the "Tate Letter" to Acting Attorney General Philip B. Perlman, stating that the State Department would adopt a restrictive theory of foreign sovereign immunity. *Id.* at 487 n. 9, 103 S.Ct. 1962. From that point forward immunity was granted only in suits involving a foreign sovereign's public acts.

In an effort to reduce the political and diplomatic pressure foreign governments often placed on the State Department to grant immunity, Congress sought to codify the standards and

conditions for determining when sovereign immunity would be denied. In 1976, Congress enacted the FSIA "to free the Government from the case-by-case diplomatic pressures, to clarify the governing standards, and to 'assur[e] litigants that ... decisions are made on purely legal grounds and under procedures that insure due process.' " *Id.* at 488, 103 S.Ct. 1962, (quoting H.R.Rep. No. 94-1487, at 7 (1976) reprinted in 1976 U.S.C.C.A.N. 6604). Because the FSIA codified standards in place as of 1952, it is generally accepted that the FSIA applies to all events occurring from 1952 to the present. The controversy lies in whether the FSIA can be applied to events that occurred before 1952.

The D.C. Circuit has never expressly addressed the issue of whether the FSIA applies to pre-1952 events. Although, in *Princz v. Federal Republic of Germany,* 26 F.3d 1166, 1170-71 (D.C.Cir.1994), the court did comment on the issue. Without deciding the question the court provided some significant observations. Focusing on *Landgraf v. USI Film Products,* 511 U.S. 244, 114 S.Ct. 1483, 128 L.Ed.2d 229 (1994), [FN3] it reasoned that the FSIA might be applied retroactively to pre-1952 events because doing so would not affect the foreign sovereign's substantive rights. The court stated in dicta that applying the FSIA to Germany's acts during World War II "would not alter Germany's liability under the applicable substantive law in force at the time, i.e. it would just remove the bar of sovereign immunity to the plaintiff's vindicating his rights under that law." ***58** *Princz,* 26 F.3d at 1171. This analysis tends to reflect the line of cases that have confronted the issue since the 1994 decision in *Landgraf. See Altmann v. Republic of Austria,* 142 F.Supp.2d 1187, 1198-1201 (C.D.Cal.2001) (holding that the FSIA applied to pre-1952 events); *Haven v. Rzeczpospolita Polska (Republic of Poland),* 68 F.Supp.2d 943

(N.D.Ill.1999) (adopting the reasoning in *Princz* and concluding that the FSIA applied to pre-1952 events).

> FN3. In *Landgraf,* a case dealing generally with retroactive application of statutes, the Supreme Court held that,
> only a statute that would impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed is truly retroactive. A statute affecting jurisdiction, on the other hand, usually take[s] away no substantive right but simply changes the tribunal that is to hear the case. Present law normally governs in such situations because jurisdictional statutes speak to the power of the court rather than to the rights or obligations of the parties. *Princz,* 26 F.3d at 1170 (internal quotations and citations omitted).

Although the only two circuits that expressly addressed this issue held that the FSIA did not apply to pre-1952 events, *see Carl Marks & Co., Inc. v. Union of Soviet Socialist Republics,* 841 F.2d 26, 27 (2d Cir.1988); *Jackson v. People's Republic of China,* 794 F.2d 1490, 1497-98 (11th Cir.1986), both of these cases were decided prior to *Landgraf* and *Princz.* Additionally, at least two district court judges in this circuit have also decided the issue, and both found that the FSIA did not apply to pre-1952 events. *See Lin v. Government of Japan,* C.A. No. 92-2574, 1994 WL 193948, at *2 (D.D.C. May 6, 1994) (Hens-Green, J.); *Djordjevich v. Federal Republic of Germany,* 827 F.Supp. 814 (D.D.C.1993) (Hens-Green, J.), *aff'd on other grounds,* 1997

WL 530499, 124 F.3d 1309 (D.C.Cir.1997); *Slade v. United States of Mexico,* 617 F.Supp. 351, 355 (D.D.C.1985) (Greene, J.), *aff'd without opinion,* 790 F.2d 163 (D.C.Cir.1986). Again, however, these cases were decided prior to *Princz.*

As was the case in *Princz,* this court need not "decide whether the FSIA applies to pre-1952 events, however, in order to resolve this case." *Princz,* 26 F.3d at 1171; *see also Sampson v. Federal Republic of Germany,* 250 F.3d 1145, 1149 n. 3 (7th Cir.2001) ("We need not decide whether the pre-1952 law or the less stringent theory of sovereign immunity codified in the FSIA applies because, ... Sampson's suit against Germany is barred even under the lower standards of the FSIA."). Assuming that the FSIA does govern plaintiffs' claims, none of its exceptions apply. On the other hand the if FSIA does not apply, and if Japan is not entitled to sovereign immunity under pre-1952 law, plaintiffs' claims must still be dismissed because they are nonjusticiable.

B. Exceptions to the FSIA

Based upon the waiver and commercial activity exceptions plaintiffs advance three arguments in support of Japan's amenability to suit. First, plaintiffs claim that Japan explicitly waived immunity in the Potsdam Declaration signed after World War II. Second, plaintiffs argue that the acts in question constitute a violation of the *jus cogens* norms of the law of nations, and as such immunity was implicitly waived. And third, plaintiffs assert that the acts were in connection with commercial activities outside the United States that had a direct effect inside the United States. Because at this stage of the litigation Japan only challenges

the legal sufficiency of plaintiffs' allegations, the court will assume the allegations in the complaint are true in order to determine if these FSIA exceptions apply. *See Phoenix Consulting,* 216 F.3d at 40.

Section 1605(a) of the FSIA provides, *inter alia,* that

> A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case--
> (1) in which the foreign state has waived its immunity either explicitly or by implication, notwithstanding any withdrawal of the waiver which the foreign state may purport to effect except in accordance with the terms of the waiver;
> (2) in which the action is based upon a commercial activity carried on in the ***59** United States by the foreign state; or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States;

28 U.S.C. § 1605(a).

1. Explicit Waiver Under the Potsdam Declaration

[3][4] Relying on § 1605(a)(1), plaintiffs first argue that Japan explicitly waived its sovereign immunity by agreeing to the terms of the Potsdam Declaration. However, because case law states that such a waiver needs to be clear, intentional, and unambiguous, plaintiffs' argument must be rejected. The Potsdam Declaration does not explicitly state that Japan waived its immunity or intended to subject itself to civil suits in United States courts, and therefore does not constitute an explicit waiver of immunity under § 1605(a)(1).

Plaintiffs rely on a paragraph of the Potsdam Declaration that states:

> We do not intend that the Japanese shall be enslaved as a race or destroyed as a nation, but stern justice shall be meted out to all war criminals, including those who have visited cruelties upon our prisoners. The Japanese Government shall remove all obstacles to the revival and strengthening of democratic tendencies among the Japanese people.

Potsdam Declaration, July 26, 1945. Plaintiffs also seek support from a post-World War II case in which the Supreme Court noted that "Japan, by her acceptance of the Potsdam Declaration and her surrender, has acquiesced in the trials of those guilty of violations of the law of war." *In re Yamashita,* 327 U.S. 1, 13, 66 S.Ct. 340, 90 L.Ed. 499 (1946). While the statement of the Supreme Court is entirely consistent with the language of the Potsdam Declaration, neither of these sources support plaintiffs' position that Japan explicitly waived its immunity.

[5] In *Argentine Republic v. Amerada Hess Shipping Corp.,* 488 U.S. 428, 109 S.Ct. 683, 102 L.Ed.2d 818 (1989), the Supreme Court stated that it did not "see how a foreign state can waive its immunity under § 1605(a)(1) by signing an international agreement that contains no mention of a waiver of immunity to suit in United States courts or even the availability of a cause of action in the United States." *Id.* at 442-43, 109 S.Ct. 683. An "[e]xplicit waiver is generally found when the [ ] language itself clearly and unambiguously states that the parties intended waiver, and therefore adjudication, in the United States." *Commercial Corp. Sovrybflot v. Corporacion de Fomento de la Produccion,* 980 F.Supp. 710, 712 (S.D.N.Y.1997) (quoting *Eaglet Corp. Ltd. v. Banco Central De Nicaragua,* 839 F.Supp. 232, 234

(S.D.N.Y.1993)); *see, e.g., Foremost-McKesson, Inc. v. Islamic Republic of Iran,* 905 F.2d 438 (D.C.Cir.1990) (holding that Iran did not waive its sovereign immunity in the Treaty of Amity, which extended only to enterprises of Iran doing business in the U.S. and not to Iran itself); *Maritime Int'l Nominees Establishment v. Republic of Guinea,* 693 F.2d 1094, 1100 n. 10 (D.C.Cir.1982) (stating that "Congress contemplated waivers of a much more specific and explicit nature than the one MINE constructs from the operation of this Guinean law").

In addition, as Japan argues, the Potsdam provision holds individuals accountable for war crimes, but cannot extend to holding the government of Japan liable in a civil suit. Similarly, in *Von Dardel v. Union of Soviet Socialist Republics,* 736 F.Supp. 1 (D.D.C.1990), a district court ***60** found that the Vienna Convention "requires jurisdiction over *crimes,* not civil suits, and in any event not necessarily over foreign states. The 1973 Convention contains no terms at all which conflict with sovereign immunity." *Id.* at 5.

Therefore, because the law requires that an explicit waiver must be unambiguous and intentional, the court concludes that Japan's agreement with the terms of the Potsdam Declaration does not constitute an explicit waiver under § 1605(a)(1).

2. Jus Cogens *Violations*

[6][7][8] Plaintiffs next contend that Japan's *jus cogens* violations constitute an implied waiver of sovereign immunity under § 1605(a)(1). [FN4] However, this argument is contrary to the law of this circuit. In *Princz* the D.C. Circuit squarely held that the "*jus cogens* theory of implied

waiver is incompatible with the intentionality requirement implicit in § 1605(a)(1).... [A]n implied waiver depends upon the foreign government's having at some point indicated its amenability to suit." *Princz,* 26 F.3d at 1174. Acknowledging that "it is doubtful that any state has ever violated *jus cogens* norms on a scale rivaling that of the Third Reich," the D.C. Circuit nonetheless concluded that *jus cogens* violations did not constitute an implied waiver under § 1605(a)(1). *Id.* This conclusion is the same one reached by the three other circuit courts that have ruled on the issue. *See Sampson v. Federal Republic of Germany,* 250 F.3d 1145, 1156 (7th Cir.2001) (concluding that "Congress did not create an exception to foreign sovereign immunity under the FSIA for violations *of jus cogens* norms"); *Cabiri v. Government of the Republic of Ghana,* 165 F.3d 193, 202 (2d Cir.1999) (holding that a waiver could not be implied from a sovereign's *jus cogens* violation); *Smith v. Socialist People's Libyan Arab Jamahiriya,* 101 F.3d 239 (2d Cir.1996) (same); *Siderman de Blake v. Republic of Argentina,* 965 F.2d 699, 719 (9th Cir.1992) ("[W]e conclude that if violations of *jus cogens* committed outside the United States are to be exceptions to immunity, Congress must make them so. The fact that there has been a violation of *jus cogens* does not confer jurisdiction under the FSIA.")

> FN4. "A *jus cogens* norm is a principle of international law that is 'accepted by the international community of States as a whole as a norm from which no derogation is permitted....' Such peremptory norms are 'nonderogable and enjoy the highest status within international law,' they 'prevail over and invalidate international agreements and other rules of international law in conflict with them,' and they are

> 'subject to modification only by a subsequent norm of international law having the same character.' " According to one authority, a state violates *jus cogens,* as currently defined, if it: 'practices, encourages, or condones (a) genocide, (b) slavery or slave trade, (c) the murder or causing the disappearance of individuals, (d) torture or other cruel, inhuman, or degrading treatment or punishment, (e) prolonged arbitrary detention, (f) systematic racial discrimination, or (g) a consistent pattern of gross violations of internationally recognized human rights.' *Princz,* 26 F.3d at 1173 (internal citations omitted).

Quite telling of the weakness of their argument is the fact that plaintiffs have failed to cite any United States court decision, nor is the court aware of any, holding that *jus cogens* violations constitute a waiver under the FSIA. Indeed, plaintiffs acknowledge the D.C. Circuit's holding in *Princz,* but ask the court to disregard it. Instead, plaintiffs argue that this court should adopt the reasoning in Judge Wald's dissent in *Princz,* suggesting that the majority's opinion is no longer good law.

This argument must fail. The majority's opinion in *Princz* unquestionably remains ***61** good law. Indeed, in *Creighton Ltd. v. Government of the State of Qatar,* 181 F.3d 118 (D.C.Cir.1999), the D.C. Circuit recently reaffirmed the underlying rationale of *Princz.* The court stated that "we have ... followed the 'virtually unanimous' precedents construing the implied waiver provision narrowly. In particular, we have held that implicit in § 1605(a)(1) is the requirement that the foreign state have intended to waive its

sovereign immunity." *Creighton,* 181 F.3d at 122 (citing *Princz,* 26 F.3d at 1174) (internal citation omitted).

In light of the binding precedent of the D.C. Circuit in *Princz,* the court concludes that Japan's *jus cogens* violations do not constitute an implied waiver under § 1605(a)(1).

3. Commercial Activity Exception

Lastly, plaintiffs maintain that this case falls within the FSIA exception provided in the third clause of § 1605(a)(2). Plaintiffs argue that the present action is based "upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act cause[d] a direct effect in the United States." 28 U.S.C. § 1605(a)(2); *see* Pls.' Mot.Decl.J. at 31.

Plaintiffs' argument is based on the allegation that the "comfort stations" were merely "state-supervised brothels," and therefore constitute commercial activities that occurred outside the United States. In an effort to satisfy the second prong, plaintiffs advance three theories explaining how these "commercial activities" had a "direct effect" inside the United States. They first argue that "comfort stations" were established inside Guam and the Philippines. Because these were United States territories at the time, plaintiffs maintain there was a direct effect in the United States. Second, plaintiffs assert that after World War II the Japanese territories occupied by the United States military became part of the United States. Therefore, the burden of repatriating, debriefing, housing, clothing, and treating "comfort women" in these areas was a direct effect in the United States. Third, plaintiffs claim that the alleged use of "comfort women" by United States servicemen after the war constituted a direct

effect in the United States. *See* Pls' Mot.Decl.J. at 34-38.

[9][10] In order to evaluate the applicability of § 1605(a)(2), the court must first determine if the alleged conduct can be considered a commercial activity within the meaning of the FSIA. Plaintiffs argue that the "comfort women" system constituted a commercial activity under § 1605(a)(2). Pls.' Mot.Decl.J. at 31. Both Japan and the United States [FN5] disagree, maintaining that Japan's conduct does not fall within the commercial activity exception. The FSIA defines "commercial activity" to mean "either a regular course of commercial conduct or a particular commercial transaction or act. The commercial character of an activity shall be determined by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose." 28 U.S.C. § 1603(d). The Supreme Court has elaborated on this definition, stating that

> FN5. Pursuant to 28 U.S.C. § 517, the United States filed a statement of interest in this case. In this document the United States agrees with Japan's position that plaintiffs' claims are barred by sovereign immunity and present a nonjusticiable political question.

when a foreign government acts, not as regulator of a market, but in the manner of a private player within it, the foreign sovereign's actions are "commercial" within the meaning of the FSIA. Moreover ... the question is not whether the ***62** foreign government is acting with a profit motive or instead with the aim of fulfilling uniquely sovereign objectives. Rather, the issue is whether the particular actions that the foreign state performs (whatever

> the motive behind them) are the type of actions by which a private party engages in "trade and traffic or commerce," Black's Law Dictionary 270 (6th ed.1990).

Republic of Argentina v. Weltover, Inc., 504 U.S. 607, 614, 112 S.Ct. 2160, 119 L.Ed.2d 394 (1992).

After *Weltover,* the Supreme Court next examined the commercial activity exception in *Saudi Arabia v. Nelson,* 507 U.S. 349, 113 S.Ct. 1471, 123 L.Ed.2d 47 (1993). The plaintiff in *Nelson* was recruited in the United States for a job at a Saudi-government-owned hospital in Saudi Arabia. *See id.* at 352. He subsequently accepted a position in which he monitored certain hospital equipment and facilities to ensure patient safety. *See id.* While performing this task he discovered "safety defects" at the hospital, and reported the problems to Saudi government officials. *See id. at* 353, 113 S.Ct. 1471. The Saudi government responded by imprisoning Nelson. While in prison he was allegedly tortured and interrogated repeatedly. *See id.* After his release Nelson and his wife filed a lawsuit against Saudi Arabia. They sought to overcome Saudi Arabia's sovereign immunity by arguing under the first clause of § 1605(a)(2) that their claims were "based upon a commercial activity carried on in the United States." The commercial activity upon which they relied was the recruitment of Nelson in the United States. *See id.* at 354-55.

The Supreme Court rejected this argument. Writing for the Court Justice Souter reasoned that the conduct the Nelsons challenged, wrongful arrest, imprisonment, and torture,

> boil[ed] down to abuse of the power of its police by the Saudi Government, and however monstrous such abuse undoubtedly may be, a foreign state's exercise of the power of its police has long been understood for purposes of the

> restrictive theory as peculiarly sovereign in nature. Exercise of the powers of police and penal officers is not the sort of action by which private parties can engage in commerce.

Id. at 361-62, 113 S.Ct. 1471 (internal citations and footnote omitted). The court next rejected the argument that because Nelson was imprisoned and tortured in retaliation for reporting safety violations at a hospital, "the mistreatment was consequently commercial." *Id.* This argument failed because it went to the purpose of the Saudi Government's conduct, the very inquiry that the FSIA "renders irrelevant." *Id.* at 363, 113 S.Ct. 1471. Addressing this issue the court stated that "[w]hatever may have been the Saudi Government's motivation for its allegedly abusive treatment of Nelson, it remains the case that the Nelsons' action is based upon a sovereign activity immune from the subject-matter jurisdiction of the United States courts under the Act." *Id.* at 363, 113 S.Ct. 1471

Shortly after *Nelson* was decided, the D.C. Circuit analyzed § 1605(a)(2) in *Cicippio v. Islamic Republic of Iran,* 30 F.3d 164 (D.C.Cir.1994). Joseph Cicippio was abducted in Lebanon by Islamic terrorists. After his release he filed a suit against Iran, alleging that the terrorists were Iranian agents. Although Iran enjoyed immunity under the FSIA, Cicippio sought to invoke the commercial activity exception. Cicippio argued that because the hostage taking was intended to "gain economic advantages" it constituted a commercial activity. *Id.* at 166.

***63** However, relying on the FSIA, *Weltover,* and *Nelson,* the court refused to consider the motives behind the kidnapping, and focused instead on the issue of whether "hostage taking itself can be described as a commercial

activity--without regard to its purpose." *Id.* at 167. Consistent with the FSIA, and without eschewing the directives of *Weltover* and *Nelson,* the court found that "[a]lthough the purpose and perhaps the illegal character of the alleged acts are irrelevant in judging their commercial character, ... the context in which the acts take place must be germane." *Id.* at 168. The FSIA, the court observed, "was obviously designed to prevent the foreign sovereign from casting a governmental purpose, which always can be found, as a cloak of protection over typical commercial activities, not to reach out to cover all sorts of alleged nefarious acts." *Id.* Given this framework, the court concluded that the alleged kidnapping was not a commercial act within the meaning of the FSIA. [FN6]

> FN6. Ultimately Cicippio did bring a successful suit against Iran, but only after Congress amended the FSIA in 1996 by adding an exception permitting suits against countries designated as state sponsors of terrorism. *See* 28 U.S.C. § 1605(a)(7); *Cicippio v. Islamic Republic of Iran,* 18 F.Supp.2d 62 (D.D.C.1998).

[11] Applying the standards set forth in 28 U.S.C. § 1603(d), *Weltover,* and *Nelson,* this court agrees with Japan and the United States that plaintiffs' claims do not arise in connection with a commercial activity. Although it is undeniable that prostitution and brothels routinely exist as commercial ventures engaged in by private parties, Japan's alleged conduct did not occur in this context. The complaint alleges that plaintiffs "were taken from their home countries occupied by Japan," and "pursuant to a premeditated master

plan" forced into sexual slavery. Compl. ¶ 1. Plaintiffs further allege that this system "was planned, ordered, established, and controlled by Japan for the benefit of its soldiers and certain others." *Id.* ¶ 27. According to plaintiffs, the "comfort stations" were buildings near the front lines of the war that "were either appropriated by the Japanese military or makeshift constructions built by the army specifically to house 'comfort women' " *Id.* ¶ 26. Many of the "comfort women" were abducted from their homes, "often in large scale raids in countries under Japanese control." *Id.* ¶ 25. Plaintiffs even acknowledge that "[t]he 'comfort women' system required the deployment of the vast infrastructure and resources that were at the government's disposal, including soldiers and support personnel, weapons, all forms of land and sea transportation, and engineering and construction crews and material." *Id.* ¶ 56.

The described conduct is unquestionably barbaric, but certainly is not commercial in nature. Japan's use of its war-time military to impose "a premeditated master plan" of sexual slavery upon the women of occupied Asian countries might be characterized properly as a war crime or a crime against humanity. This conduct, however, was not in connection with a commercial activity. [FN7] As plaintiffs correctly recognize, this system "required" the resources at the government's disposal. Such conduct is not typically engaged in by private players in the market.

FN7. At oral argument plaintiffs' counsel also invoked the first clause of the commercial activity exception. The court will not address this issue because it was raised for the first time at oral argument. Needless to say, in light of the court's conclusion that the "comfort

women" system was not a commercial activity, plaintiffs' position with respect to the first clause of § 1605(a)(2) would also fail.

***64** Plaintiffs seek to avoid this conclusion by alleging that "soldiers using the 'comfort women' were normally charged a fixed price" and that "a portion of the revenue was taken by the military." *Id.* ¶ 55. This argument, too, must be rejected. The mere fact that soldiers allegedly paid money in order to access "comfort stations," is insufficient to justify characterizing the challenged conduct as commercial in nature. As the D.C. Circuit noted in *Cicippio,* the fact that ransom "was allegedly sought from relatives of the hostages could not make an ordinary kidnapping a commercial act any more than murder by itself would be treated as a commercial activity merely because the killer is paid." *Cicippio,* 30 F.3d at 168. Here, as in *Nelson,* the challenged conduct "boils down" to an abuse--albeit an extremely outrageous and inhumane one--of Japan's military power, an activity that is "peculiarly sovereign in nature." *Nelson,* 507 U.S. at 362, 113 S.Ct. 1471; *see also Doe v. Unocal Corp.,* 963 F.Supp. 880, 887-88 (C.D.Cal.1997) (relying on *Nelson* to dismiss claims against the Burmese government where the plaintiffs alleged that the Government used violence, intimidation, and slavery in connection with a commercial pipeline project). Therefore, because the court concludes that Japan's operation of "comfort stations" was not a commercial activity within the meaning of the FSIA, the commercial activity exception does not apply in this case. [FN8]

FN8. The court, therefore, need not determine whether Japan's alleged conduct caused a "direct

effect" in the United States.

Accordingly, as the court is persuaded that none of the exceptions to the FSIA relied upon by plaintiffs are applicable, Japan's motion to dismiss for lack of subject matter jurisdiction must be granted.

C. Political Question Doctrine

Even if Japan did not enjoy sovereign immunity, this case must also be dismissed because it is nonjusticiable. Japan argues that plaintiffs' claims present a nonjusticiable political question. In its statement of interest the United States also argues that the political question doctrine requires dismissal. [FN9] The roots of the political question doctrine can be traced back to early federal jurisprudence. In *Marbury v. Madison,* 5 U.S. (1 Cranch) 137, 169, 2 L.Ed. 60 (1803), Chief Justice Marshall wrote for the Supreme Court that "[q]uestions, in their nature political ... can never be made in this court." Of course, this statement is not entirely accurate, as federal courts routinely adjudicate cases of a political nature. *See, e.g., Japan Whaling Ass'n v. American Cetacean Soc.,* 478 U.S. 221, 229, 106 S.Ct. 2860, 92 L.Ed.2d 166 (1986) (noting that "not every matter touching on politics is a political question").

FN9. Although both Japan and the United States maintain that this case should be dismissed as a political question, the focus of their arguments is somewhat different. Japan first argues that "[c]laims for [w]ar [r]eparations [a]re [n]on-justiciable as a[m]atter of [l]aw," and that "individuals may not

assert war-related claims except as authorized by a treaty of peace." Def.'s Mot. to Dismiss at 16, 18. The United States, on the other hand, while also arguing that this case is a political question, does not rely on the proposition asserted by Japan that war reparations are always nonjusticiable. Like the United States, the court concludes based on the specific circumstances of this case that plaintiffs' claims are nonjusticiable, and therefore need not address Japan's position regarding the justiciability of war reparations in general.

The Supreme Court has articulated two primary justifications for the political question doctrine: "the appropriateness under our system of government of attributing finality to the action of the political ***65** departments and also the lack of satisfactory criteria for a judicial determination." *Baker v. Carr,* 369 U.S. 186, 210, 82 S.Ct. 691, 7 L.Ed.2d 663 (1962) (quoting *Coleman v. Miller,* 307 U.S. 433, 454-55, 59 S.Ct. 972, 83 L.Ed. 1385 (1939)) (internal quotations omitted). The first of these considerations "is primarily a function of the separation of powers," *Baker,* 369 U.S. at 210, 82 S.Ct. 691, while the second is grounded in the inherent "limitation[s] of the judiciary as a decisional body." *Occidental of Umm al Qaywayn, Inc. v. A Certain Cargo of Petroleum,* 577 F.2d 1196, 1203 (5th Cir.1978).

Certain types of cases often have been found to present political questions. *See Baker,* 369 U.S. at 211-22, 82 S.Ct. 691. One such category is cases involving questions of foreign relations. It is well- established that "[t]he conduct of the foreign relations of our government is committed by the Constitution to the executive and legislative--'the

political'--departments of the government, and the propriety of what may be done in the exercise of this political power is not subject to judicial inquiry or decision." *Oetjen v. Central Leather Co.*, 246 U.S. 297, 302, 38 S.Ct. 309, 62 L.Ed. 726 (1918). Accordingly, "many [foreign relations] questions uniquely demand single-voiced statement of the Government's views." *Baker*, 369 U.S. at 211, 82 S.Ct. 691 (citing *Doe v. Braden*, 57 U.S. (16 How.) 635, 657, 14 L.Ed. 1090 (1853)). The Supreme Court further has cautioned that decisions relating to foreign policy "are delicate, complex, and involve large elements of prophecy. They are and should be undertaken only by those directly responsible to the people whose welfare they advance or imperil. They are decisions of a kind for which the Judiciary has neither aptitude, facilities nor responsibility." *Chicago & S. Air Lines, Inc. v. Waterman S.S. Corp.*, 333 U.S. 103, 111, 68 S.Ct. 431, 92 L.Ed. 568 (1948).

[12] However, it is equally clear that not all cases implicating foreign relations present political questions. *See Baker*, 369 U.S. at 211, 82 S.Ct. 691 (noting that it is "error to suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance"). For example, courts certainly possess "the authority to construe treaties and executive agreements." *Japan Whaling Ass'n*, 478 U.S. at 230, 106 S.Ct. 2860. Further guidance in determining what constitutes a political question comes from *Baker v. Carr*, in which the Supreme Court announced six factors that must be considered when deciding if a case presents a political question. In *Baker* the Court held that:

> Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department; *or a lack of judicially discoverable*

> *and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion;* or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

Baker, 369 U.S. at 217, 82 S.Ct. 691 (emphasis added). If any of these six factors "is inextricable from the case at bar," then "dismissal for non- justiciability on the ground of a political question's presence" is appropriate. *Id.* In *Goldwater v. Carter,* Justice Powell summed up the *Baker* criteria as follows: "(i) Does the issue involve resolution of questions committed by the ***66** text of the Constitution to a coordinate branch of Government? (ii) Would resolution of the question demand that a court move beyond areas of judicial expertise? (iii) Do prudential considerations counsel against judicial intervention?" *Goldwater v. Carter,* 444 U.S. 996, 998, 100 S.Ct. 533, 62 L.Ed.2d 428 (1979) (Powell, J., concurring); *see also Antolok v. United States,* 873 F.2d 369, 381 (D.C.Cir.1989) (applying the analysis discussed by Justice Powell in *Goldwater*).

[13] Although adjudication of the present case would certainly implicate United States foreign policy, this fact alone does not justify dismissal. However, prudential concerns together with the court's lack of judicial expertise strongly militate in favor of dismissal. While to some extent each of the factors identified in *Baker* is inextricable from the present case, there can be no doubt that resolution of plaintiffs' claims would require "an initial policy

determination of a kind clearly for nonjudicial discretion," and be hindered by a "lack of judicially discoverable and manageable standards for resolving it." *Baker,* 369 U.S. at 217, 82 S.Ct. 691. Not only would the court have to move beyond its "judicial expertise," but "prudential considerations counsel against judicial intervention." *Goldwater,* 444 U.S. at 998, 100 S.Ct. 533 (Powell, J., concurring).

Thirty-five years ago the D.C. Circuit was confronted with a case that presented a similar dilemma. In *Kelberine v. Societe Internationale,* 363 F.2d 989 (D.C.Cir.1966), two United States citizens brought a lawsuit seeking reparations for damages caused by the Nazis during World War II. After the war the United States Government was in possession of various assets that had previously belonged to companies that participated in the "Nazi conspiracy." *Kelberine,* 363 F.2d at 991-92. One such company, Interhandel, sued to recover this property. The government ultimately agreed that some of the property belonging to Interhandel would be sold at auction. The auction occurred, and Interhandel was due to receive a payment. On behalf of themselves and other victims of the Nazi atrocities, the plaintiffs sued to stop this payment. They argued that the auction proceeds should have been redirected to the victims of the Nazi regime.

In affirming the district court's dismissal of the complaint the D.C. Circuit reasoned in part that the plaintiffs' "thesis is not presently susceptible of judicial implementation." *Id.* at 995. Although the court's opinion did not explicitly cite *Baker v. Carr,* its conclusion was premised on the reality that

> [a]s presently framed, the problem is not within the established scope of judicial authority. It did not arise under the Constitution or laws of the United States, or within the territorial jurisdiction of the courts of the United

> States.... The span between the doing of the damage and the application of the claimed assuagement is too vague. The time is too long. The identity of the alleged tort feasors is too indefinite. The procedure sought-- adjudication of some two hundred thousand claims for multifarious damages inflicted twenty to thirty years ago in a European area by a government then in power--is too complicated, too costly, to justify undertaking by a court without legislative provision of the means wherewith to proceed.

Id. This rationale is even more persuasive now, decades later, when plaintiffs seek to adjudicate conduct sixty to seventy years after it occurred. Additionally, unlike in *Kelberine* where the defendant was a corporation, here the defendant is the Government of Japan.

As the United States points out in its papers, "[t]he history of Japan's war claims settlements with the United States and its allies, including the Philippines, ***67** and various Chinese and Korean political entities is complex." U.S. St. of Interest at 23. The 1951 Treaty of Peace with Japan resolved all "claims of the Allied Powers and their nationals arising out of any actions taken by Japan and its nationals in the course of the prosecution of the war." Treaty of Peace with Japan, Sept. 8, 1951, 3 U.S.T. 3169, art. 14(b), T.I.A.S. No. 2490. The Philippines signed and ratified this agreement, thereby settling the claims of its nationals. Japan, as it was required to do pursuant to the 1951 Treaty of Peace, subsequently entered into agreements with other nations as well. *See* U.S. St. of Interest at 25-28 Specifically, Korea and China both negotiated separate agreements addressing war claims. *See id.* Although as plaintiffs argue the claims of the "comfort women" might not have been specifically mentioned in these treaties, the series of treaties signed after the war was clearly aimed at resolving all war claims against Japan.

There is no question that this court is not the appropriate forum in which plaintiffs may seek to reopen those discussions nearly a half century later. Just as the agreements and treaties made with Japan after World War II were negotiated at the government-to-government level, so too should the current claims of the "comfort women" be addressed directly between governments. Several district courts have recently reached this same conclusion with respect to reparations for victims of the Nazi regime. These courts concluded that "the post-war claims settlement regime had been exclusively constructed by political branches, and that it was not the place of courts to resolve [these] claims." *In re Nazi Era Cases Against German Defendants Litigation,* 129 F.Supp.2d. 370, 377-78 (D.N.J.2001); *see also Burger-Fischer v. DeGussa AG,* 65 F.Supp.2d 248 (D.N.J.1999) (holding that certain claims of World War II slave laborers present nonjusticiable political questions); *Iwanowa v. Ford Motor Co.,* 67 F.Supp.2d 424 (D.N.J.1999) (same). Although the cases addressing reparations for victims of Nazi atrocities arose in a slightly different factual context than that of the "comfort women," the result nonetheless remains the same. The court therefore concludes that even if Japan did not enjoy sovereign immunity, plaintiffs' claims are nonjusticiable and must be dismissed.

III. CONCLUSION

For the foregoing reasons, this court is unable to provide plaintiffs the redress they seek and surely deserve. Consequently, Japan's motion to dismiss is granted. An appropriate order accompanies this memorandum.

JUDGMENT

Pursuant to Fed.R.Civ.P. 58 and for the reasons stated by the court in its memorandum opinion docketed this same day, it is this 4th day of October, 2001, hereby

ORDERED and ADJUDGED that defendant's motion to dismiss is granted and the complaint in this case is **DISMISSED.**

United States Court of Appeals,
District of Columbia Circuit.

GEUM JOO HWANG, et al., Appellants,
v.
JAPAN, Minister Yohei Kono, Minister of Foreign Affairs, Appellee.

No. 01-7169.

Argued Dec. 10, 2002.
Decided June 27, 2003.
Rehearing and Rehearing En Banc Denied Aug. 22, 2003.

Before: GINSBURG, Chief Judge, and SENTELLE and TATEL, Circuit Judges.

ORDER

Upon consideration of appellants' petition for rehearing filed July 25, 2003, it is hereby **ORDERED** that the petition be denied.

Per Curiam

United States Court of Appeals,
District of Columbia Circuit.

GEUM JOO HWANG, et al., Appellants,
v.
JAPAN, Minister Yohei Kono, Minister of Foreign Affairs, Appellee.

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Before: GINSBURG, Chief Judge, and EDWARDS, SENTELLE, HENDERSON, RANDOLPH, ROGERS, TATEL, GARMAND, and ROBERTS,* Circuit Judges.

ORDER

Upon consideration of appellants' petition for rehearing en banc, and the absence of a request by any member of the court for a vote, it is hereby

ORDERED that the petition be denied.

Per Curiam

* Circuit Judge Roberts did not participate in this matter.

STATUTES

UNITED STATES CODE ANNOTATED
TITLE 28. JUDICIARY AND JUDICIAL PROCEDURE
PART IV--JURISDICTION AND VENUE
CHAPTER 81--SUPREME COURT

§ 1254. Courts of appeals; certiorari; certified questions

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

(2) By certification at any time by a court of appeals of any question of law in any civil or criminal case as to which instructions are desired, and upon such certification the Supreme Court may give binding instructions or require the entire record to be sent up for decision of the entire matter in controversy.

UNITED STATES CODE ANNOTATED
TITLE 28. JUDICIARY AND JUDICIAL PROCEDURE
PART IV--JURISDICTION AND VENUE
CHAPTER 85--DISTRICT COURTS; JURISDICTION

§ 1330. Actions against foreign states

(a) The district courts shall have original jurisdiction without regard to amount in controversy of any nonjury civil action against a foreign state as defined in section 1603(a) of this

title as to any claim for relief in personam with respect to which the foreign state is not entitled to immunity either under sections 1605-1607 of this title or under any applicable international agreement.

(b) Personal jurisdiction over a foreign state shall exist as to every claim for relief over which the district courts have jurisdiction under subsection (a) where service has been made under section 1608 of this title.

(c) For purposes of subsection (b), an appearance by a foreign state does not confer personal jurisdiction with respect to any claim for relief not arising out of any transaction or occurrence enumerated in sections 1605-1607 of this title.

UNITED STATES CODE ANNOTATED
TITLE 28. JUDICIARY AND JUDICIAL PROCEDURE
PART IV--JURISDICTION AND VENUE
CHAPTER 85--DISTRICT COURTS; JURISDICTION

§ 1331. Federal question

The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

UNITED STATES CODE ANNOTATED
TITLE 28. JUDICIARY AND JUDICIAL PROCEDURE
PART IV--JURISDICTION AND VENUE
CHAPTER 85--DISTRICT COURTS; JURISDICTION
§ 1350. Alien's action for tort

The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.

UNITED STATES CODE ANNOTATED
TITLE 28. JUDICIARY AND JUDICIAL PROCEDURE
PART IV--JURISDICTION AND VENUE
CHAPTER 85--DISTRICT COURTS; JURISDICTION
§ 1367. Supplemental jurisdiction

(a) Except as provided in subsections (b) and (c) or as expressly provided otherwise by Federal statute, in any civil action of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution. Such supplemental jurisdiction shall include claims that involve the joinder or intervention of additional parties.

(b) In any civil action of which the district courts have original jurisdiction founded solely on section 1332 of this title, the district courts shall not have supplemental jurisdiction under subsection (a) over claims by plaintiffs against persons made parties under Rule 14, 19, 20, or 24 of the Federal Rules of Civil Procedure, or over claims by persons proposed to be

joined as plaintiffs under Rule 19 of such rules, or seeking to intervene as plaintiffs under Rule 24 of such rules, when exercising supplemental jurisdiction over such claims would be inconsistent with the jurisdictional requirements of section 1332.

(c) The district courts may decline to exercise supplemental jurisdiction over a claim under subsection (a) if--

(1) the claim raises a novel or complex issue of State law,

(2) the claim substantially predominates over the claim or claims over which the district court has original jurisdiction,

(3) the district court has dismissed all claims over which it has original jurisdiction, or

(4) in exceptional circumstances, there are other compelling reasons for declining jurisdiction.

(d) The period of limitations for any claim asserted under subsection (a), and for any other claim in the same action that is voluntarily dismissed at the same time as or after the dismissal of the claim under subsection (a), shall be tolled while the claim is pending and for a period of 30 days after it is dismissed unless State law provides for a longer tolling period.

(e) As used in this section, the term "State" includes the District of Columbia, the Commonwealth of Puerto Rico, and any territory or possession of the United States.

UNITED STATES CODE ANNOTATED
TITLE 28. JUDICIARY AND JUDICIAL PROCEDURE
PART IV--JURISDICTION AND VENUE
CHAPTER 97--JURISDICTIONAL IMMUNITIES OF FOREIGN STATES

§ 1602. Findings and declaration of purpose

The Congress finds that the determination by United States courts of the claims of foreign states to immunity from the jurisdiction of such courts would serve the interests of justice and would protect the rights of both foreign states and litigants in United States courts. Under international law, states are not immune from the jurisdiction of foreign courts insofar as their commercial activities are concerned, and their commercial property may be levied upon for the satisfaction of judgments rendered against them in connection with their commercial activities. Claims of foreign states to immunity should henceforth be decided by courts of the United States and of the States in conformity with the principles set forth in this chapter.

UNITED STATES CODE ANNOTATED
TITLE 28. JUDICIARY AND JUDICIAL PROCEDURE
PART IV--JURISDICTION AND VENUE
CHAPTER 97--JURISDICTIONAL IMMUNITIES OF FOREIGN STATES

§ 1605. General exceptions to the jurisdictional immunity of a foreign state

(a) A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case--

. . .

(2) in which the action is based upon a commercial activity carried on in the United States by the foreign state; or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States;

. . .

(5) not otherwise encompassed in paragraph (2) above, in which money damages are sought against a foreign state for personal injury or death, or damage to or loss of property, occurring in the United States and caused by the tortious act or omission of that foreign state or of any official or employee of that foreign state while acting within the scope of his office or employment; except this paragraph shall not apply to--

(A) any claim based upon the exercise or performance or the failure to exercise or perform a discretionary function regardless of whether the discretion be abused, or

(B) any claim arising out of malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights. . . .

TREATY OF PEACE WITH JAPAN

Whereas the Allied Powers and Japan are resolved that henceforth their relations shall be those of nations which, as sovereign equals, cooperate in friendly association to promote their common welfare and to maintain international peace and security, and are therefore desirous of concluding a Treaty of Peace which will settle questions still outstanding as a result of the existence of a state of war between them;

Whereas Japan for its part declares its intention to apply for membership in the United Nations and in all circumstances to conform to the principles of the Charter of the United Nations; to strive to realize the objectives of the Universal Declaration of Human Rights; to seek to create within Japan conditions of stability and well-being as defined in Articles 55 and 56 of the Charter of the United Nations and already initiated by post-surrender Japanese legislation; and in public and private trade and commerce to conform to internationally accepted fair practices;

Whereas the Allied Powers welcome the intentions of Japan set out in the foregoing paragraph;

The Allied Powers and Japan have therefore determined to conclude the present Treaty of Peace, and have accordingly appointed the undersigned Plenipotentiaries, who, after presentation of their full powers, found in good and due form, have agreed on the following provisions:

CHAPTER I

PEACE

Article 1

(a) The state of war between Japan and each of the Allied Powers is terminated as from the date on which the present Treaty comes into force between Japan and the Allied Power concerned as provided for in Article 23.

(b) The Allied Powers recognize the full sovereignty of the Japanese people over Japan and its territorial waters.

CHAPTER II

TERRITORY

Article 2

(a) Japan, recognizing the independence of Korea, renounces all right, title and claim to Korea, including the islands of Quelpart, Port Hamilton and Dagelet.

(b) Japan renounces all right, title and claim to Formosa and the Pescadores.

(c) Japan renounces all right, title and claim to the Kurile Islands, and to that portion of Sakhalin and the islands adjacent to it over which Japan acquired sovereignty as a consequence of the Treaty of Portsmouth of September 5, 1905.

(d) Japan renounces all right, title and claim in connection with the League of Nations Mandate System, and accepts the action of the United Nations Security Council of April 2, 1947, extending the trusteeship system to the Pacific Islands formerly under mandate to Japan.

(e) Japan renounces all claim to any right or title to or interest in connection with any part of the Antarctic area, whether deriving from the activities of Japanese nationals or otherwise.

(f) Japan renounces all right, title and claim to the Spratly Islands and to the Paracel Islands.

Article 3

Japan will concur in any proposal of the United States to the United Nations to place under its trusteeship system, with the United States as the sole administering authority, Nansei Shoto south of 29° north latitude (including the Ryukyu Islands and the Daito Islands), Nanpo Shoto south of Sofu Gan (including the Bonin Islands, Rosario Island and the Volcano Islands) and Parece Vela and Marcus Island. Pending the making of such a proposal and affirmative action thereon, the United States will have the right to exercise all and any powers of administration, legislation and jurisdiction over the territory and inhabitants of these islands, including their territorial waters.

Article 4

(a) Subject to the provisions of paragraph (b) of this Article, the disposition of property of Japan and of its nationals in the areas referred to in Article 2, and their claims, including debts, against the authorities presently administering such areas and the residents (including juridical persons) thereof, and the disposition in Japan of property of such authorities and residents, and of claims, including debts, of such authorities and residents against Japan and its nationals, shall be the subject of special arrangements between Japan and such authorities. The property of any of the Allied Powers or its nationals in the areas referred to in Article 2 shall, insofar as this has not already been done, be returned by the administering authority in the condition in which it now exists. (The term nationals whenever used in the present Treaty includes juridical persons.)

(b) Japan recognizes the validity of dispositions of property of Japan and Japanese nationals made by or pursuant to directives of the United States Military Government in any of the areas referred to in Articles 2 and 3.

(c) Japanese owned submarine cables connecting Japan with territory removed from Japanese control pursuant to the present Treaty shall be equally divided, Japan retaining the Japanese terminal and adjoining half of the cable, and the detached territory the remainder of the cable and connecting terminal facilities.

CHAPTER III

SECURITY

Article 5

(a) Japan accepts the obligations set forth in Article 2 of the Charter of the United Nations, and in particular the obligations

(i) to settle its international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered;

(ii) to refrain in its international relations from the threat or use of force against the territorial integrity or political independence of any State or in any other manner inconsistent with the Purposes of the United Nations;

(iii) to give the United Nations every assistance in any action it takes in accordance with the Charter and to refrain from giving assistance to any State against which the United Nations may take preventive or enforcement action.

(b) The Allied Powers confirm that they will be guided by the principles of Article 2 of the Charter of the United Nations in their relations with Japan.

(c) The Allied Powers for their part recognize that Japan as a sovereign nation possesses the inherent right of individual or collective self-defense referred to in Article

51 of the Charter of the United Nations and that Japan may voluntarily enter into collective security arrangements.

Article 6

(a) All occupation forces of the Allied Powers shall be withdrawn from Japan as soon as possible after the coming into force of the present Treaty, and in any case not later than 90 days thereafter. Nothing in this provision shall, however, prevent the stationing or retention of foreign armed forces in Japanese territory under or in consequence of any bilateral or multilateral agreements which have been or may be made between one or more of the Allied Powers, on the one hand, and Japan on the other.

(b) The provisions of Article 9 of the Potsdam Proclamation of July 26, 1945, dealing with the return of Japanese military forces to their homes, to the extent not already completed, will be carried out.

(c) All Japanese property for which compensation has not already been paid, which was supplied for the use of the occupation forces and which remains in the possession of those forces at the time of the coming into force of the present Treaty, shall be returned to the Japanese Government within the same 90 days unless other arrangements are made by mutual agreement.

CHAPTER IV

POLITICAL AND ECONOMIC CLAUSES

Article 7

(a) Each of the Allied Powers, within one year after the present Treaty has come into force between it and Japan, will notify Japan which of its prewar bilateral treaties or conventions with Japan it wishes to continue in force or revive, and any treaties or conventions so notified shall continue in force or be revived subject only to such amendments as may be necessary to ensure conformity with the present Treaty. The treaties and conventions so notified shall be considered as having been continued in force or revived three months after the date of notification and shall be registered with the Secretariat of the United Nations. All such treaties and conventions as to which Japan is not so notified shall be regarded as abrogated.

(b) Any notification made under paragraph (a) of this Article may except from the operation or revival of a treaty or convention any territory for the international relations of which the notifying Power is responsible, until three months after the date on which notice is given to Japan that such exception shall cease to apply.

Article 8

(a) Japan will recognize the full force of all treaties now or hereafter concluded by the Allied Powers for terminating the state of war initiated on September 1, 1939, as well as any other arrangements by the Allied

Powers for or in connection with the restoration of peace. Japan also accepts the arrangements made for terminating the former League of Nations and Permanent Court of International Justice.

(b) Japan renounces all such rights and interests as it may derive from being a signatory power of the Conventions of St. Germain-en-Laye of September 10, 1919, and the Straits Agreement of Montreux of July 20, 1936, and from Article 16 of the Treaty of Peace with Turkey signed at Lausanne on July 24, 1923.

(c) Japan renounces all rights, title and interests acquired under, and is discharged from all obligations resulting from, the Agreement between Germany and the Creditor Powers of January 20, 1930, and its Annexes, including the Trust Agreement, dated May 17, 1930; the Convention of January 20, 1930, respecting the Bank for International Settlements; and the Statutes of the Bank for International Settlements. Japan will notify to the Ministry of Foreign Affairs in Paris within six months of the first coming into force of the present Treaty its renunciation of the rights, title and interests referred to in this paragraph.

Article 9

Japan will enter promptly into negotiations with the Allied Powers so desiring for the conclusion of bilateral and multilateral agreements providing for the regulation or limitation of fishing and the conservation and development of fisheries on the high seas.

Article 10

Japan renounces all special rights and interests in China, including all benefits and privileges resulting from the provisions of the final Protocol signed at Peking on September 7, 1901, and all annexes, notes and documents supplementary thereto, and agrees to the abrogation in respect to Japan of the said protocol, annexes, notes and documents.

Article 11

Japan accepts the judgments of the International Military Tribunal for the Far East and of other Allied War Crimes Courts both within and outside Japan, and will carry out the sentences imposed thereby upon Japanese nationals imprisoned in Japan. The power to grant clemency, to reduce sentences and to parole with respect to such prisoners may not be exercised except on the decision of the Government or Governments which imposed the sentence in each instance, and on the recommendation of Japan. In the case of persons sentenced by the International Military Tribunal for the Far East, such power may not be exercised except on the decision of a majority of the Governments represented on the Tribunal, and on the recommendation of Japan.

Article 12

(a) Japan declares its readiness promptly to enter into negotiations for the conclusion with each of the Allied Powers of treaties or agreements to place their trading, maritime and other commercial relations on a stable and friendly basis.

(b) Pending the conclusion of the relevant treaty or agreement, Japan will, during a period of four years from the first coming into force of the present Treaty

(1) accord to each of the Allied Powers, its nationals, products and vessels

(i) most-favored-nation treatment with respect to customs duties, charges, restrictions and other regulations on or in connection with the importation and exportation of goods;

(ii) national treatment with respect to shipping, navigation and imported goods, and with respect to natural and juridical persons and their interests - such treatment to include all matters pertaining to the levying and collection of taxes, access to the courts, the making and performance of contracts, rights to property (tangible and intangible), participation in juridical entities constituted under Japanese law, and generally the conduct of all kinds of business and professional activities;

(2) ensure that external purchases and sales of Japanese state trading enterprises shall be based solely on commercial considerations.

(c) In respect to any matter, however, Japan shall be obliged to accord to an Allied Power national treatment, or

most-favored-nation treatment, only to the extent that the Allied Power concerned accords Japan national treatment or most-favored-nation treatment, as the case may be, in respect of the same matter. The reciprocity envisaged in the foregoing sentence shall be determined, in the case of products, vessels and juridical entities of, and persons domiciled in, any non-metropolitan territory of an Allied Power, and in the case of juridical entities of, and persons domiciled in, any state or province of an Allied Power having a federal government, by reference to the treatment accorded to Japan in such territory, state or province.

(d) In the application of this Article, a discriminatory measure shall not be considered to derogate from the grant of national or most-favored-nation treatment, as the case may be, if such measure is based on an exception customarily provided for in the commercial treaties of the party applying it, or on the need to safeguard that party's external financial position or balance of payments (except in respect to shipping and navigation), or on the need to maintain its essential security interests, and provided such measure is proportionate to the circumstances and not applied in an arbitrary or unreasonable manner.

(e) Japan's obligations under this Article shall not be affected by the exercise of any Allied rights under Article 14 of the present Treaty; nor shall the provisions of this Article be understood as limiting the undertakings assumed by Japan by virtue of Article 15 of the Treaty.

Article 13

(a) Japan will enter into negotiations with any of the Allied Powers, promptly upon the request of such Power of Powers, for the conclusion of bilateral or multilateral agreements relating to international civil air transport.

(b) Pending the conclusion of such agreement or agreements, Japan will, during a period of four years from the first coming into force of the present Treaty, extend to such Power treatment not less favorable with respect to air-traffic rights and privileges than those exercised by any such Powers at the date of such coming into force, and will accord complete equality of opportunity in respect to the operation and development of air services.

(c) Pending its becoming a party to the Convention on International Civil Aviation in accordance with Article 93 thereof, Japan will give effect to the provisions of that Convention applicable to the international navigation of aircraft, and will give effect to the standards, practices and procedures adopted as annexes to the Convention in accordance with the terms of the Convention.

CHAPTER V

CLAIMS AND PROPERTY

Article 14

(a) It is recognized that Japan should pay reparations to the Allied Powers for the damage and suffering caused by it during the war. Nevertheless it is also recognized that the resources of Japan are not presently sufficient, if it is to

maintain a viable economy, to make complete reparation for all such damage and suffering and at the same time meet its other obligations.

Therefore,

1. Japan will promptly enter into negotiations with Allied Powers so desiring, whose present territories were occupied by Japanese forces and damaged by Japan, with a view to assisting to compensate those countries for the cost of repairing the damage done, by making available the services of the Japanese people in production, salvaging and other work for the Allied Powers in question. Such arrangements shall avoid the imposition of additional liabilities on other Allied Powers, and, where the manufacturing of raw materials is called for, they shall be supplied by the Allied Powers in question, so as not to throw any foreign exchange burden upon Japan.

2. (I) Subject to the provisions of sub-paragraph (II) below, each of the Allied Powers shall have the right to seize, retain, liquidate or otherwise dispose of all property, rights and interests of

(a) Japan and Japanese nationals,

(b) persons acting for or on behalf of Japan or Japanese nationals, and

(c) entities owned or controlled by Japan or Japanese nationals, which on the first coming into force of the present Treaty were subject to its jurisdiction. The property, rights and interests specified in this sub-paragraph shall include those now blocked, vested or in the possession or under the

control of enemy property authorities of Allied Powers, which belonged to, or were held or managed on behalf of, any of the persons or entities mentioned in (a), (b) or (c) above at the time such assets came under the controls of such authorities.

(II) The following shall be excepted from the right specified in subparagraph (I) above:

(i) property of Japanese natural persons who during the war resided with the permission of the Government concerned in the territory of one of the Allied Powers, other than territory occupied by Japan, except property subjected to restrictions during the war and not released from such restrictions as of the date of the first coming into force of the present Treaty;

(ii) all real property, furniture and fixtures owned by the Government of Japan and used for diplomatic or consular purposes, and all personal furniture and furnishings and other private property not of an investment nature which was normally necessary for the carrying out of diplomatic and consular functions, owned by Japanese diplomatic and consular personnel;

(iii) property belonging to religious bodies or private charitable institutions and used exclusively for religious or charitable purposes;

(iv) property, rights and interests which have come within its jurisdiction in consequence of the resumption of trade and financial relations subsequent to September 2, 1945, between the country concerned and Japan, except such as have resulted from transactions contrary to the laws of the Allied Power concerned;

(v) obligations of Japan or Japanese nationals, any right, title or interest in tangible property located in Japan, interests in enterprises organized under the laws of Japan,

or any paper evidence thereof; provided that this exception shall only apply to obligations of Japan and its nationals expressed in Japanese currency.

(III) Property referred to in exceptions (i) through (v) above shall be returned subject to reasonable expenses for its preservation and administration. If any such property has been liquidated the proceeds shall be returned instead.

(IV) The right to seize, retain, liquidate or otherwise dispose of property as provided in sub-paragraph (I) above shall be exercised in accordance with the laws of the Allied Power concerned, and the owner shall have only such rights as may be given him by those laws.

(V) The Allied Powers agree to deal with Japanese trademarks and literary and artistic property rights on a basis as favorable to Japan as circumstances ruling in each country will permit.

(b) Except as otherwise provided in the present Treaty, the Allied Powers waive all reparations claims of the Allied Powers, other claims of the Allied Powers and their nationals arising out of any actions taken by Japan and its nationals in the course of the prosecution of the war, and claims of the Allied Powers for direct military costs of occupation.

Article 15

(a) Upon application made within nine months of the coming into force of the present Treaty between Japan and

the Allied Power concerned, Japan will, within six months of the date of such application, return the property, tangible and intangible, and all rights or interests of any kind in Japan of each Allied Power and its nationals which was within Japan at any time between December 7, 1941, and September 2, 1945, unless the owner has freely disposed thereof without duress or fraud. Such property shall be returned free of all encumbrances and charges to which it may have become subject because of the war, and without any charges for its return. Property whose return is not applied for by or on behalf of the owner or by his Government within the prescribed period may be disposed of by the Japanese Government as it may determine. In cases where such property was within Japan on December 7, 1941, and cannot be returned or has suffered injury or damage as a result of the war, compensation will be made on terms not less favorable than the terms provided in the draft Allied Powers Property Compensation Law approved by the Japanese Cabinet on July 13, 1951.

(b) With respect to industrial property rights impaired during the war, Japan will continue to accord to the Allied Powers and their nationals benefits no less than those heretofore accorded by Cabinet Orders No. 309 effective September 1, 1949, No. 12 effective January 28, 1950, and No. 9 effective February 1, 1950, all as now amended, provided such nationals have applied for such benefits within the time limits prescribed therein.

(c) (i) Japan acknowledges that the literary and artistic property rights which existed in Japan on December 6, 1941, in respect to the published and unpublished works of the Allied Powers and their nationals have continued in force since that date, and recognizes those rights which have arisen,

or but for the war would have arisen, in Japan since that date, by the operation of any conventions and agreements to which Japan was a party on that date, irrespective of whether or not such conventions or agreements were abrogated or suspended upon or since the outbreak of war by the domestic law of Japan or of the Allied Power concerned.

(ii) Without the need for application by the proprietor of the right and without the payment of any fee or compliance with any other formality, the period from December 7, 1941, until the coming into force of the present Treaty between Japan and the Allied Power concerned shall be excluded from the running of the normal term of such rights; and such period, with an additional period of six months, shall be excluded from the time within which a literary work must be translated into Japanese in order to obtain translating rights in Japan.

Article 16

As an expression of its desire to indemnify those members of the armed forces of the Allied Powers who suffered undue hardships while prisoners of war of Japan, Japan will transfer its assets and those of its nationals in countries which were neutral during the war, or which were at war with any of the Allied Powers, or, at its option, the equivalent of such assets, to the International Committee of the Red Cross which shall liquidate such assets and distribute the resultant fund to appropriate national agencies, for the benefit of former prisoners of war and their families on such basis as it may determine to be equitable. The categories of assets described in Article 14 (a) 2(II) (ii) through (v) of the present Treaty shall be excepted from transfer, as well as assets of Japanese

natural persons not residents of Japan on the first coming into force of the Treaty. It is equally understood that the transfer provision of this Article has no application to the 19,770 shares in the Bank for International Settlements presently owned by Japanese financial institutions.

Article 17

(a) Upon the request of any of the Allied Powers, the Japanese Government shall review and revise in conformity with international law any decision or order of the Japanese Prize Courts in cases involving ownership rights of nationals of that Allied Power and shall supply copies of all documents comprising the records of these cases, including the decisions taken and orders issued. In any case in which such review or revision shows that restoration is due, the provisions of Article 15 shall apply to the property concerned.

(b) The Japanese Government shall take the necessary measures to enable nationals of any of the Allied Powers at any time within one year from the coming into force of the present Treaty between Japan and the Allied Power concerned to submit to the appropriate Japanese authorities for review any judgment given by a Japanese court between December 7, 1941, and such coming into force, in any proceedings in which any such national was unable to make adequate presentation of his case either as plaintiff or defendant. The Japanese Government shall provide that, where the national has suffered injury by reason of any such judgment, he shall be restored in the position in which he was before the judgment was given or shall be afforded such relief as may be just and equitable in the circumstances.

Article 18

(a) It is recognized that the intervention of the state of war has not affected the obligation to pay pecuniary debts arising out of obligations and contracts (including those in respect of bonds) which existed and rights which were acquired before the existence of a state of war, and which are due by the Government or nationals of Japan to the Government or nationals of one of the Allied Powers, or are due by the Government or nationals of one of the Allied Powers to the Government or nationals of Japan. The intervention of a state of war shall equally not be regarded as affecting the obligation to consider on their merits claims for loss or damage to property or for personal injury or death which arose before the existence of a state of war, and which may be presented or re-presented by the Government of one of the Allied Powers to the Government of Japan, or by the Government of Japan to any of the Governments of the Allied Powers. The provisions of this paragraph are without prejudice to the rights conferred by Article 14.

(b) Japan affirms its liability for the prewar external debt of the Japanese State and for debts of corporate bodies subsequently declared to be liabilities of the Japanese State, and expresses its intention to enter into negotiations at an early date with its creditors with respect to the resumption of payments on those debts; to encourage negotiations in respect to other prewar claims and obligations; and to facilitate the transfer of sums accordingly.

Article 19

(a) Japan waives all claims of Japan and its nationals against the Allied Powers and their nationals arising out of the war or out of actions taken because of the existence of a state of war, and waives all claims arising from the presence, operations or actions of forces or authorities of any of the Allied Powers in Japanese territory prior to the coming into force of the present Treaty.

(b) The foregoing waiver includes any claims arising out of actions taken by any of the Allied Powers with respect to Japanese ships between September 1, 1939, and the coming into force of the present Treaty, as well as any claims and debts arising in respect to Japanese prisoners of war and civilian internees in the hands of the Allied Powers, but does not include Japanese claims specifically recognized in the laws of any Allied Power enacted since September 2, 1945.

(c) Subject to reciprocal renunciation, the Japanese Government also renounces all claims (including debts) against Germany and German nationals on behalf of the Japanese Government and Japanese nationals, including intergovernmental claims and claims for loss or damage sustained during the war, but excepting (a) claims in respect of contracts entered into and rights acquired before September 1, 1939, and (b) claims arising out of trade and financial relations between Japan and Germany after September 2, 1945. Such renunciation shall not prejudice actions taken in accordance with Articles 16 and 20 of the present Treaty.

(d) Japan recognizes the validity of all acts and omissions

done during the period of occupation under or in consequence of directives of the occupation authorities or authorized by Japanese law at that time, and will take no action subjecting Allied nationals to civil or criminal liability arising out of such acts or omissions.

Article 20

Japan will take all necessary measures to ensure such disposition of German assets in Japan as has been or may be determined by those powers entitled under the Protocol of the proceedings of the Berlin Conference of 1945 to dispose of those assets, and pending the final disposition of such assets will be responsible for the conservation and administration thereof.

Article 21

Notwithstanding the provisions of Article 25 of the present Treaty, China shall be entitled to the benefits of Articles 10 and 14(a)2; and Korea to the benefits of Articles 2, 4, 9 and 12 of the present Treaty.

CHAPTER VI

SETTLEMENT OF DISPUTES

Article 22

If in the opinion of any Party to the present Treaty there has arisen a dispute concerning the interpretation or execution of the Treaty, which is not settled by reference to a special claims tribunal or by other agreed means, the dispute shall, at the request of any party thereto, be referred for decision to the International Court of Justice. Japan and those Allied Powers which are not already parties to the Statute of the International Court of Justice will deposit with the Registrar of the Court, at the time of their respective ratifications of the present Treaty, and in conformity with the resolution of the United Nations Security Council, dated October 15, 1946, a general declaration accepting the jurisdiction, without special agreement, of the Court generally in respect to all disputes of the character referred to in this Article.

CHAPTER VII

FINAL CLAUSES

Article 23

(a) The present Treaty shall be ratified by the States which sign it, including Japan, and will come into force for all the States which have then ratified it, when instruments of ratification have been deposited by Japan and by a majority, including the United States of America as the principal occupying Power, of the following States, namely Australia, Canada, Ceylon, France, Indonesia, the Kingdom of the Netherlands, New Zealand, Pakistan, the Republic of the Philippines, the United Kingdom of Great Britain and

Northern Ireland, and the United States of America. The present Treaty shall come into force for each State which subsequently ratifies it, on the date of the deposit of its instrument of ratification.

(b) If the Treaty has not come into force within nine months after the date of the deposit of Japan's ratification, any State which has ratified it may bring the Treaty into force between itself and Japan by a notification to that effect given to the Governments of Japan and the United States of America not later than three years after the date of deposit of Japan's ratification.

Article 24

All instruments of ratification shall be deposited with the Government of the United States of America which will notify all the signatory States of each such deposit, of the date of the coming into force of the Treaty under paragraph (a) of Article 23, and of any notifications made under paragraph (b) of Article 23.

Article 25

For the purposes of the present Treaty the Allied Powers shall be the States at war with Japan, or any State which previously formed a part of the territory of a State named in Article 23, provided that in each case the State concerned has signed and ratified the Treaty. Subject to the provisions of Article 21, the present Treaty shall not confer any rights,

titles or benefits on any State which is not an Allied Power as herein defined; nor shall any right, title or interest of Japan be deemed to be diminished or prejudiced by any provision of the Treaty in favor of a State which is not an Allied Power as so defined.

Article 26

Japan will be prepared to conclude with any State which signed or adhered to the United Nations Declaration of January 1, 1942, and which is at war with Japan, or with any State which previously formed a part of the territory of a State named in Article 23, which is not a signatory of the present Treaty, a bilateral Treaty of Peace on the same or substantially the same terms as are provided for in the present Treaty, but this obligation on the part of Japan will expire three years after the first coming into force of the present Treaty. Should Japan make a peace settlement or war claims settlement with any State granting that State greater advantages than those provided by the present Treaty, those same advantages shall be extended to the parties to the present Treaty.

Article 27

The present Treaty shall be deposited in the archives of the Government of the United States of America which shall furnish each signatory State with a certified copy thereof.

IN FAITH WHEREOF the undersigned Plenipotentiaries have signed the present Treaty.

DONE at the city of San Francisco this eighth day of September 1951, in the English, French, and Spanish languages, all being equally authentic, and in the Japanese language.

FOR ARGENTINA:

(Signature)

FOR AUSTRALIA:

(Signature)

FOR THE KINGDOM OF BELGIUM:

(Signature)

(Signature)

FOR BOLIVIA:

(Signature)

FOR BRAZIL:

(Signature)

(Signature)

FOR CAMBODIA:

(Signature)

FOR CANADA:

(Signature)

(Signature)

FOR CEYLON:

(Signature)

(Signature)

(Signature)

FOR CHILE:

(Signature)

FOR COLOMBIA:

(Signature)

(Signature)

FOR COSTA RICA:

(Signature)

(Signature)

(Signature)

FOR CUBA:

(Signature)

(Signature)

(Signature)

FOR THE DOMINICAN REPUBLIC:

(Signature)

(Signature)

FOR ECUADOR:

(Signature)

(Signature)

FOR EGYPT:

(Signature)

FOR EL SALVADOR:

(Signature)

(Signature)

FOR ETHIOPIA:

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FOR FRANCE:

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FOR GREECE:

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FOR GUATEMALA:

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FOR HAITI:

(Signature)

(Signature)

FOR HONDURAS:

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(Signature)

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FOR INDONESIA:

(Signature)

FOR IRAN:

(Signature)

FOR IRAQ:

(Signature)

FOR LAOS:

(Signature)

FOR LEBANON:

(Signature)

FOR LIBERIA:

(Signature)

(Signature)

(Signature)

(Signature)

FOR THE GRAND DUCHY OF LUXEMBOURG:

(Signature)

FOR MEXICO:

(Signature)

(Signature)

(Signature)

FOR THE KINGDOM OF THE NETHERLANDS:

(Signature)

(Signature)

FOR NEW ZEALAND:

(Signature)

FOR NICARAGUA:

(Signature)

(Signature)

FOR THE KINGDOM OF NORWAY:

(Signature)

FOR PAKISTAN:

(Signature)

FOR PANAMA:

(Signature)

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FOR PARAGUAY:

(Signature)

FOR PERU:

(Signature)

FOR THE REPUBLIC OF THE PHILIPPINES:

(Signature)

(Signature)

(Signature)

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(Signature)

(Signature)

FOR SAUDI ARABIA:

(Signature)

FOR SYRIA:

(Signature)

FOR THE REPUBLIC OF TURKEY:

(Signature)

FOR THE UNION OF SOUTH AFRICA:

(Signature)

FOR THE UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND:

(Signature)

(Signature)

(Signature)

FOR THE UNITED STATES OF AMERICA:

(Signature)

(Signature)

(Signature)

(Signature)

FOR URUGUAY:

(Signature)

FOR VENEZUELA:

(Signature)

(Signature)

FOR VIET NAM:

(Signature)

(Signature)

(Signature)

(Signature)

FOR JAPAN:

(Signature)

(Signature)

(Signature)

(Signature)

(Signature)

(Signature)

PETITIONERS' COMPLAINT

UNITED STATES DISTRICT COURT
DISTRICT OF COLUMBIA

HWANG Geum Joo)
705 Dong 507, Jukong Apt. Deungchon-dong,)
Kangseo-gu, Seoul, Republic of Korea)
)
YUAN Zhulin)
Hankou, Wuhan, Hebei,)
People's Republic of China)
)
Lola Tomasa SALINOG)
Santiago Street, San Jose City)
Antique, Philippines)
)
LIU Huang A-tau)
#60. Alley 51, Jen-1 Road,)
17th Ling, Dong-Men Li,)
Feng-Shan City, Kaoshiung County, Taiwan)
)
KIM Boon-sun)
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)
KIM Sang Hee)
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Shiyoung Apt. Kongreung-dong, Nowon-gu,)
Seoul, Republic of Korea)
)
KIM Soon-Duk)
65 Wondang-ri, Twoechon-myon,)
Kwangju-gun, Kyunggi-do, Republic of Korea)

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LU Xiuzhen
Town of Miao Zeng, Cong Ming County,
Shanghai, People's Republic of China

GUO Yaying
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People's Republic of China

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Narcisa CLAVERIA
c/o Lila-Pilipina
49 Matimplin Street, Brgy. Central
Diliman, Quezon City, Philippines

Maxima Regala DE LA CRUZ
Bo Mapanique, Candaba

Pampanga, Philippines)
)
On behalf of themselves and all)
others similarly situated,)
)
Plaintiffs,)
)
v.)
)
JAPAN)
Minister Yohei Kono)
Minister of Foreign Affairs)
2-2-1 Kasumigaseki)
Chiyoda-ku, Tokyo 100, Japan)
)
Defendant.)

NATURE OF ACTION

1. Plaintiffs, "comfort women" who were victims of sexual slavery during the period 1931 to 1945, bring this action against the Government of Japan. This is a civil action arising under the law of nations, the laws of the United States of America, the laws of Japan and the laws of the District of Columbia on behalf of women who were taken from their homes in countries occupied by Japan and who, pursuant to a premeditated master plan, were forced into sexual slavery, enduring repeated rapes, harsh treatment, torture and beatings, but who have never received compensation from Japan for their suffering.

2. Plaintiffs seek compensation for the suffering and

injustices they experienced as a result of the inhuman conditions inflicted upon them.

3. Defendant committed, conspired to commit, furthered, and aided and abetted others who committed war crimes and crimes against humanity. Defendant enslaved female civilian under its control. No statute of limitations exists with respect to war crimes and crimes against humanity. Moreover, evidence of the extent of Defendant's participation in wrongdoing has more fully come to light only in recent years as archives in East Germany, Russia and China are opening.

JURISDICTION AND VENUE

4. This Court has subject matter jurisdiction based on the following: (a) 28 U.S.C. § 1350, the Alien Tort Claims Act; (b) 28 U.S.C. § 1331 in that Plaintiffs make claims against Defendants under federal common law as it incorporates customary international law and international treaties; and (c) 28 U.S.C. § 1367 for any claims not otherwise covered by the aforementioned jurisdictional bases.

5. This Court has jurisdiction over Japan pursuant to 28 U.S.C. § 1605(a). Japan has waived its immunity as to the claims of the "Comfort Women" as described in 28 U.S.C. § 1605(a)(1). In addition, the planning, establishment and operation of a network of "comfort houses" is a commercial activity that is not subject to sovereign immunity pursuant to 28 U.S.C. § 1605(a)(2).

6. Venue is proper in this Court because where a foreign state is a defendant, a civil action may be brought in the United States District Court for the District of Columbia pursuant to 28 U.S.C. § 1391(f)(4).

PARTIES
Plaintiffs

7. Hwang Geum Joo was born in 1922 in Puyo in what is now the Republic of Korea. In 1941, while Ms. Hwang was in school, she was told that the Japanese Emperor Hirohito had ordered all unmarried girls to work in Japanese military factories for three years. Ms. Hwang was told to report to Hamhung train station. There she was put on a Japanese military train with about fifty women packed in each car. Most of the women were about fifteen or sixteen years old. The women were then transferred to a truck and driven for a half a day to a large troop compound in Kilim. There they stayed in tin huts with wood floors called "koya." Over the next two weeks, they were raped repeatedly. After two weeks, the Japanese sent the women to a "comfort station," a building with about five or six partitioned rooms with torn blankets draped over the doorways. It was very cold, and the women had to survive on small amounts of rice and soup made of water and salt. Many of the women became so sick that they had yellow pus from their pubic hair to their belly buttons, and their faces turned yellow as well. Women who got sick three times were taken away by the soldiers and never returned. Ms. Hwang and the other women were forced to service thirty to forty soldiers on an average day and even more on Sundays and holidays. They

were beaten daily. Once, Ms. Hwang was beaten so badly that she was unconscious for three days. The women were frequently injected with shots of a drug called "606" and they suffered from bleeding, swelling, and infertility. In 1943, Ms. Hwang was transferred to another comfort station in Shakhalin or Haulpin. There the soldiers were much more harsh and demanding even than the ones in Kilim. After eight or nine months Ms. Hwang was returned to Kilim. Of the twenty women who had come with Ms. Hwang from Hamhung, she was the only survivor. Soon after Ms. Hwang returned to Kilim, the Japanese deserted the camp, and, though in very weak condition, she fled alone. Since then she has struggled to survive. Because of the extreme mental and physical pain caused by her service as a comfort woman, she has even considered suicide. Among other injuries, she experiences periods of deafness, and at times the swelling in her knees and buttocks the swelling is so great that she is unable to sit down.

8. Yuan Zhulin was born in 1922 in Wuhan, Hubei Province, China. She was married in 1938, two years before the Japanese invaded Wuhan. In August of 1941, Ms. Yuan was offered a job cleaning hotels in other parts of Hubei province. She went with several other girls on a boat to Ezhou, in the lower reaches of the Changjiang River. As soon as they got ashore they were taken to the town's Buddhist temple, which had been transformed by the Japanese army into a military camp and "comfort house." She was forced inside by men with bayonets. Once inside Ms. Yuan was told to take off her clothes for a "health examination." When she refused she was whipped by

the guards until she complied. Then she was given a Japanese name meaning "massage girl." She was given a room that contained condoms, aspirin ointment, lubricating oil, makeup paper and toilet paper. The woman in charge showed her how to use the condom and the oil and told her that if she did not make herself up everyday she would be whipped and starved. That night a board was placed above her door that read "massage girl." The next day a group of Japanese soldiers came to the house. Ms. Yuan was raped by ten of them. At the end of the day her private parts ached severely and she could not sit down. From that day forward, Ms. Yuan became a sex slave to the Japanese army. The Japanese soldiers paid money for tickets to enter the comfort house. Tickets were good for anywhere from 30 minutes to a full day. The "comfort women" were not able to rest in the evenings because they were forced to accompany captains, and even when they were menstruating they were not allowed to rest. Although Ms. Yuan used contraceptive pills and the soldiers sometimes wore condoms, in 1942 she became pregnant. While attempting to escape from the house, however, she was caught and beaten so badly that the baby was lost. Ms. Yuan then became the personal slave of a Japanese commander, who repeatedly raped her. Later she was sent to "Rich Island" where she was forced to serve the Japanese soldiers and supply them with sex services. After about 6 months the commander got tired of Ms. Yuan and transferred her to a low- ranking captain named who secretly helped Ms. Yuan and her mother and sister escape to Limekiln Fort (the present Huangshi). In 1943 Ms. Yuan found out that her only daughter, born the year

before her abduction, had died. Since the war, Ms. Yuan has lived in poverty. She has suffered from insomnia and bad dreams, and she has had to live with the stigma of being considered a prostitute and traitor to her country.

9. Tomasa Salinog was born in the Philippines, on December 8, 1928. Her mother died a month later. Ms. Salinog was thirteen years old when the Japanese troops invaded in 1942. She and her father took refuge in the mountains, but after the governor announced that their city was safe, they decided to return home. About two weeks later, they were awakened by people breaking into their house. Two Japanese soldiers entered their home, and another two remained posted outside. The two inside began to take Ms. Salinog away. When her father resisted, one of the soldiers, Captain Hirooka, hit him with a sword and he fell. Ms. Salinog ran to her father and saw that his head had been severed. She cried out in anguish, but the Japanese soldiers took no pity and dragged her out of the house. The soldiers took her to a large house near the Japanese garrison and only a few meters from her house. Many other women were already in the building. Two Japanese soldiers confined Ms. Salinog in a room. The next morning, before dawn, Captain Hirooka and another Japanese soldier came into the room and demanded sex. Although Ms. Salinog strenuously resisted, Captain Hirooka raped her. When another man tried to rape her she fought again. She was hit on the head and knocked unconscious. After she regained consciousness, she cried the rest of the day. The scars she got the first day she was raped still remain. Later,

two to five soldiers a day came into her room regularly to rape her. Very often she was continuously raped from afternoon to late at night. Sometimes soldiers waited on vacant beds for their turn while she was being raped by another. Soldiers from mountain patrols who had been drinking tuba (a local coconut wine) were particularly brutal. The Japanese soldiers told her that if she tried to escape, she would be found and killed. Once, however, when a soldier had left a key on the table, she opened the door and ran to a shack where a husband and wife were living and sought refuge. When a Japanese soldier came in, the couple tried to hide her in a wooden box, but, threatened with decapitation, they handed Ms. Salinog over. The soldier did not know about Ms. Salinog's escape, but believed she was the couple's daughter. He took her home as his personal slave. He and his friends regularly raped her. After the war, Ms. Salinog returned home, finding her house severely damaged. With the help of relatives, she repaired the house and moved back in. Since that time, she has been living on her own on a very small income. She has never married. So deep were the wounds inflicted by the Japanese that she feared that she might be hurt again if she married. She felt so humiliated by her experiences as a "comfort woman" that she viewed herself as no more than a pig in a pen. Her suffering has grown with the passing of time.

10. Liu Huang A-Tau, 77, was born in Taiwan, on February 6, 1923. She was given away for adoption shortly after birth but was reunited with her parents when she was about seven years old. Growing up poor, Liu Huang A-Tau never had any schooling. In

1943, Liu Huang A-Tau and a friend came across a help wanted advertisement posted outside a travel agency offering nursing positions in Southeast Asia. Her friend was intrigued and decided to sign up. She invited Liu Huang A-Tau to go along. Liu Huang A-Tau hesitated at first because of her illiteracy and lack of proper skills, but she was eventually enticed to accept a position as a cook for a term of six months. Twenty-three young women, including Liu Huang A-Tau, were soon assembled. They were taken by a Japanese woman and a Japanese man, Mr. Khaki, to the seaport in Kaoshiung. The girls were loaded onto a ship, the Asamamaru, heading for Balikpapan in the Dutch East Indies. While en route, the women became aware that, rather than what they had been told, they were being taken to a "comfort station." They asked to be sent back to Taiwan, but their protest was met with a threat of death by drowning. The "comfort station" was a group of huts hastily built with palm tree leaves, with a total of about sixty rooms. Liu Huang A-Tau, like the other women, was in total shock and felt chilled to her bones when she learned her job was to provide sex to the soldiers, but she had no choice but to give in to the order. Liu Huang A-Tau was so naive that she even attempted to save a blood-stained bed sheet after her first brutal sex assault to show it to her parents as criminal evidence. Liu Huang A-Tau once tried to escape in the middle of the night, but was stopped by military police. She cried in bed every night. The "comfort station" charged the soldiers fees for the sexual services. Streams of enlisted men came in during the day and officers came in at night. Each "comfort woman" including Liu Huang A-Tau, had to serve

over thirty men each day. When the soldiers were drunk, their task was even worse. The "comfort women" from Japanese colonies were told that they must sacrifice themselves for the sake of patriotism to the Empire of Japan. Liu Huang A-Tau clung to the hope that her servitude would only last six months, but in fact the ordeal was to go on for nearly three years. When the war was over, Liu Huang A-Tau was abandoned by her captors in the British East Indies with no way to get home. She eventually found help in the overseas Taiwanese community and returned to Keelung, Taiwan, after five months. While she was a "comfort woman," Liu Huang A-Tau contracted malaria, but received neither doctor care nor any effective medicine. To this day, Liu Huang A-Tau continues to suffer in many ways from wartime injuries. Her ovaries had to be removed. She has also lost her eyesight due to injuries received during bombing raids in the battlefield.

11. Kim Boon-sun was born in 1922 and grew up in a village in what is now South Korea. When Ms. Kim was 15 years old she was abducted by a man in a Japanese police uniform while collecting vegetables with her younger brother. Along with other young girls, she was taken to Pusan where she was put on a ship to Japan. She was taken to several locations, finally landing in Taiwan. In Taiwan, Ms. Kim and the others were forced to serve as "comfort women" for 3 months. After that they were taken to Manila where they were joined with Filipino "comfort women." While in the comfort houses, Ms. Kim was fed very little and was always hungry. On weekdays she had to service 15 to 20 soldiers a day and many

more on weekends. She was infected with venereal diseases many times and treated with a drug called "606." She is unable to bear children as a result. Ms. Kim was beaten so severely that her back was permanently injured and her face became mangled. After four years of this torture, at age 19, Ms. Kim met a Sergeant Yamamoto who took pity on her and sent her home. When she got home she found that her father had died and her mother had thought that she had been killed. Ms. Kim is now in poor health and lives alone.

12. Kim Sang Hee was born in 1920 in Korea. When she was fourteen years old, she was abducted by a group of men and taken by truck to the Taegu railroad station, where there were about a hundred girls already waiting. Ms. Kim and the others were taken on an overnight train and then forcibly boarded on a ship to Shanghai. From there, Ms. Kim was taken to a processing point where there were many other abducted girls. After a few days, the girls were dispatched in groups to different places, and Ms. Kim was sent with a group of other girls to Suzhou, China. In Suzhou Ms. Kim was given a number and a Japanese name and was taken to a house with a sign that read "comfort station." There she was raped repeatedly, with each soldier allotted a thirty- minute session. Ms. Kim was in such pain that, on her first night, she unsuccessfully tried to commit suicide by drinking an entire bottle of disinfectant. Her vagina became injured and swollen from the repeated rapes. After three years in Suzhou, Ms. Kim was transported to Nanjing, where she caught malaria and almost died. Later, she got appendicitis and then had vaginal

hemorrhaging. In 1943, after three years in a Nanjing "comfort station," Ms. Kim was shipped to Singapore with about six hundred other women. She was held there until the end of World War. Ms. Kim still remembers some of the soldiers' names: Lt. Kuda, Sergeants Tanaka, Maida, and Sakai. While in Japanese captivity, Ms. Kim was not given enough food, so she and other women had to pick leaves from trees and boil them into soup just to survive.

13. Kim Soon-Duk was born in 1921, in what is now the Republic of Korea. Her father was killed by Japanese police for keeping tobacco he had harvested for the government. In 1937, at age 16, Ms. Kim was recruited with other girls for work in Japanese factories. She went with about thirty girls to the port of Pusan by bus and then by ship to Nagasaki, Japan. When they arrived in Nagasaki, Ms. Kim and the others were repeatedly raped by Japanese officers over a period of about a week. Then they were shipped to China to work as sex slaves at a house near an army unit on the outskirts of Shanghai. Ms. Kim and others were added to the women who were already in the house. Each of the women was abused by thirty to forty soldiers a day. Many of the women suffered from severe vaginal swelling, and Ms. Kim's pain became so unbearable that she attempted suicide several times. The women stayed in tiny rooms. Outside the house, conditions were bleak, with human corpses strewn about and guns firing throughout the day. After three years, Ms. Kim escaped. As a result of her abuse Ms. Kim now suffers from bladder infection, uterine disease, a malformed uterus, psychological problems, and many other ailments.

14. Yi Yong Nyo was born in Korea in February, 1926. In 1942, when she was 16, she was promised a job in Japan. She went to the embarkation point but, instead of going to Japan, she was put onboard a ship with Japanese soldiers. After a month's voyage, with stops in Taiwan and Singapore during which she was not allowed to disembark, she was taken off the ship at Rangoon, Burma. From there, she was taken by train to a "comfort station" in a small town. She was given a Japanese name, Harata Yoju, and was forced to start serving as a "comfort woman". Yi Yong Nyo was forced to service large numbers of soldiers on a regular basis and suffered shame and humiliation. Soldiers would leave a small ticket called a "military payment certificate" when they entered her room. All the tickets were counted, and taken by the "comfort house" office. When another "comfort woman" committed suicide, Yi Yong Nyo and the others were told to watch while the soldiers burned the body to ashes on top of a pile of wood. After two years, only twenty of the group of the original group of fifty "comfort women" were still alive. Yi Yong Nyo was infected with malaria. Her face was severely swollen and she had been mentally deranged for half a year. At the end of the war, Yi Yong Nyo and the others of her group walked for ten days to reach Rangoon. She spent some months in a refugee camp, and was repatriated to Pusan in March 1946. She continues to suffer severely, both mentally and physically, from her period of sexual slavery.

15. Kim Bok-Dong was 16 years old in 1941 and lived in a farming village in Korea. Japanese men in uniform

came to her house and demanded her mother's consent for Bok-Dong Kim to work in a factory for three years. They took Ms. Kim away. From Yang San, she was taken to a processing point in Pusan where there were about 20 other young women her age who had been promised factory work. They were later taken to Taiwan and then to Guangdong. After she had undergone a forcible examination for venereal disease, she was taken to a "comfort house" outside an army base. From the second day there, she was forced into full-scale "comfort work," sexually servicing soldiers. At first, she resisted, but was denied food and beaten. She had had no previous sexual experience and her internal sexual organs became torn and swollen. Bok-Dong Kim endured extreme suffering and humiliation. At the "comfort house," Bok-Dong Kim usually serviced about 15 men on weekdays, and more on the weekends -- perhaps more than 50 on Sundays. After two years at Guangdong, she was taken to Hong Kong, Singapore, Malaysia, and Java. She was forced to follow the Japanese soldiers as they moved to service them, staying in each place for about two months. After Japan lost the war, she was taken to a hospital and then to a "receiving center" with about two hundred other women, where she spent about a year. When Bok-Dong Kim finally got home, she was able to admit what had happened to her only to her mother and oldest sister. Otherwise, she felt she had to keep her past as a "comfort woman" secret. The effects of her servitude was physically as well as deeply emotionally scarring. She has, for example, been unable to bear children.

16. Lu Xiuzhen was born in 1917 on Cong Ming Island, at the mouth of the Yangtze River in China. In March 1938, Lu Xiuzhen was captured by Japanese soldiers. Her mother tearfully begged them not to take her away, but the soldiers did so anyway, threatening to burn down the mother's hut. Lu Xiuzhen was brought by the soldiers to the Japanese barracks and placed in a "comfort station" in the town of Miao Zeng. There were more than two dozen young women housed in the two-story "station." Lu Xiuzhen was kept separately in a small room downstairs. There, an officer who always wore a samurai sword would come and force Lu Xiuzhen to have sex with him two or three days a week. One day during wheat harvest season, Lu Xiuzhen escaped from the "comfort station." She made her way to Shanghai where she stayed with relatives until the Japanese soldiers left. Then she went home. As a result of her experience, Lu Xiuzhen was considered "damaged goods," and has suffered social ostracism. She was also unable to bear children. The physical and mental injuries that Lu Xiuzhen suffered at the hands of Japan remain to this day.

17. Guo Yaying was born in Hong Da Village, in China, on May 29, 1913. Now 87, she is still a resident of the village. Between 1937 and 1939, the Japanese government stationed a battalion of soldiers in the nearby town of Miao Zeng. The Japanese established their barracks and "comfort station" in the center of Miao Zeng. They seized many women from local families, and forced them into sexual slavery to staff the "comfort station." The Japanese soldiers also routinely sexually assaulted certain women from the

neighboring towns and villages for a prolonged period of time. The only survivors of this group of victims are Guo Yaying and Zhu Qiaomei. Guo Yaying and her husband owned and operated a pastry store in their village, where they lived with their son. Japanese soldiers threatened Guo Yaying, warning her that unless she obeyed their orders to the letter, that is, fully submit herself to their sexual desires, they would destroy her store and imprison her husband and child. Several times each week during the period 1937 to 1939, the Japanese soldiers either went to her home to sexually assault her or took her back to their barracks where they kept her captive as their sex slave. She was typically raped by three or four men each time. Her ordeal lasted until 1939. By then her husband had died. As a result of her brutal treatment by Japan, she has suffered from many mental and physical illnesses ever since, and her ability to lead a normal life has been destroyed.

18. Zhu Qiaomei was born in China on November 7, 1910. In 1928, she married. A Japanese battalion, consisting of sixty to seventy soldiers, was stationed in her town after the Japanese invasion. In order to satisfy the sexual desires of the battalion's two head officers, seven town women were forced into a "comfort team" to serve as sex slaves. Zhu Qiaomei was one of the seven victims. These seven victims were permitted to live in their own homes. They were forced to either report for work at the " comfort station" or were raped in their own homes. When the sexual assaults began, Zhu Qiaomei was three months pregnant. She endured repeated rapes during her entire pregnancy and after giving birth to her child.

The ordeal lasted for more than two years. Zhu Qiaomei's husband, Zhou SoWen, left to join the resistance since he could no longer bear the endless torment at home. He was captured by the Japanese army and beaten to death. Zhu Qiaomei was finally released by her captors after the Japanese armed forces retreated. By then, she had contracted numerous and severe gynecological problems, which have led to life long kidney diseases. Her mental scars also run deep. In her old age, Zhu Qiaomei continues to suffer from the physical and psychological wounds inflicted by Japan.

19. Prescila Bartonico was born in 1926 in the Philippines. In 1943, when Ms. Bartonico was 17 years old, she and her family were captured by Japanese solders. Her cousin was raped in front of her and when she tried to resist, she was killed. Then Ms. Bartonico was also raped. After this she was taken to an elementary school that had been converted into a garrison that was used as a "comfort station." There she was kept with a number of other women and repeatedly raped. Ms. Bartonico was forced to work on the landing field during the day and was then raped by five to eight soldiers each night. After three months of being prisoner at the school, Ms. Bartonico escaped.

20. Narcisa Claveria was born in 1933 in a small village in the Philippines. She was one of eight children. Her father was the village headman. In 1943, during the Japanese occupation of the Philippines, Japanese soldiers came to her village. They first questioned her father about movement of the people in the area, and

about her family. They accused him of lying, and then tortured him to death, raped her mother, and bayoneted her eight-year-old sister and young brother. She tried to struggle with the soldiers, but they threw her down and broke her arm. She and her sister were then taken to a municipal building about one or two kilometers from her village. The building had been turned into a Japanese garrison. Because of her broken arm, she was taken to a nearby house where a Filipino collaborator attended to her arm by massaging it and using herbal medicine. After two weeks, she was taken back to the building where the Japanese garrison was stationed. There, she was told to bathe and given a long-sleeved khaki jacket and loose silk pants to wear. One soldier kept leering at her, and that night, he raped her when she returned to the house across from the garrison. The next morning, she was taken back to the garrison, put in a room with about five other women, and continually raped by Japanese soldiers. She and the other women slept on a cement floor with some blankets and pieces of clothes. This installation functioned as the "comfort station" for the garrison. She and the other women stayed in the garrison for three months and were raped by Japanese soldiers almost every night, and sometimes during the day as well. During the day, they were made to cook, do laundry, and fetch water for the soldiers. When the Americans started bombing the garrison, she and her sister were able to escape. They returned to their village, and found that all the houses had been burned down. They were told that their parents, her brother and sister were burned with the house the day they took her and her sister to the garrison. She and her sister then met their other

two brothers who had been forced to serve as porters for the Japanese, but who had escaped as well. Her sister became insane from the ordeal. Narcisa Claveria underwent a period of extreme shock. She later met a man whose sister had been raped and had undergone the same ordeal she had gone through. He helped Narcisa regain her strength and sanity. They married and have six children.

21. Maxima Regala De La Cruz was born in the Philippines on April 8, 1929. In August 1944, on a day when Ms. Regala and her mother went to town to buy food at the market, they were captured by Japanese soldiers. Ms. Regala and her mother were led to a large house used by the Japanese garrison and locked in adjoining rooms, where their cries and pleas were ignored. That night, a Japanese soldier entered Ms. Regala's room. He forced her at saber point to lie on a bed and gratify his sexual desires. Ms. Regala was raped many times thereafter, also often at saber point. At the time of these acts, she frequently fainted, and, when she regained consciousness, could only feel the aches and pain all over her body. Ms. Regala and her mother were imprisoned in that house for three months, and every day they were sexually abused by Japanese soldiers. One day, most of the soldiers were ordered to the field and Ms. Regala and her mother were able to escape. Since her mother was weak, Ms. Regala had to practically carry her down the stairs and out of the garrison. They traveled to the village of Anyatam, where a man helped them cross typhoon-swollen rivers and rice fields to reach their village, Mapanique. When they reached their house, their family cried when they saw how miserable they

looked. Feeling deep pain and shame, they were unable to speak about the hardship and cruelty that they experienced at the hands of the Japanese. Ms. Regala thought her ordeal with the Japanese enemy was over. It was not so. In November 1944, the Japanese first bombed and then entered her village. The men were tied up, beaten and shot. Women were caught and raped. Ms. Regala and other women were then forced to walk toward "Bahay na Pula" in the village of Anyatam, about 5 kilometers from Mapanique. There was a big house in "Bahay na Pula" that was used as a garrison by the Japanese military. Upon reaching "Bahay na Pula", Ms Regala and the other women, were brought to different rooms where they were raped by Japanese soldiers. The following morning they were released. When they returned to their village, they found the bodies of the victims who had been killed by the Japanese.

Defendant

22. Japan

23. The actions of the Japanese government in establishing and maintaining the system of sexual slavery from 1932 to 1945 violated *jus cogens* norms of international law, and are not subject to the defense of sovereign immunity. A foreign state waives its rights to sovereign immunity by violating *jus cogens* norms. Japan could not have expected to shield itself from liability for its participation in these atrocities by invoking sovereign immunity. In addition, the planning, establishment and operation of a network of "comfort houses" is a commercial activity that is not subject to sovereign immunity.

24. Various other persons, the identities of which are presently unknown, and which are not named as defendants in this Complaint, participated as co-conspirators with Defendant in the offenses and violations alleged herein and have aided, abetted and performed acts and made statements in furtherance thereof.

DEFINITIONS

25. "Comfort Women" means women who were recruited by force, coercion, or deception into sexual slavery for the Japanese military during the period 1931 to 1945. Girls as young as age eleven were kidnapped from their homes, often in large scale raids in countries under Japanese control. Others were coerced into joining the war effort, often believing they were to work in factories in Japan, or were lured by the promise of factory jobs or work as cooks or laundresses. The women were drawn primarily from those the Japanese considered racially inferior. Approximately 80% were Korean, with the remainder made up of women from, among other countries, the Philippines, China, Burma, and Indonesia along with Dutch women from the East Indies. As many as 200,000 women served as "comfort women" and were the victims of premeditated mass rape. Historians estimate that only 25% to 30% of the "comfort women" survived the war.[1] Of these survivors, only a

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[1] David Boling, *Mass Rape, Enforced Prostitution, and the Japanese Imperial Army: Japan Eschews International*

few thousand, most well over sixty years old, are still alive, many in ill health as a result of their experiences.

26. "Comfort Houses" or "comfort stations" means the locations where the "comfort women" were kept. The buildings were either appropriated by the Japanese military or makeshift constructions built by the army specifically to house "comfort women." Near the front lines, the "comfort houses" were often tents or temporary wooden shacks. The sites were often surrounded by barbed wired fences, well-guarded and patrolled.[2]

27. "Sexual Slavery" means the systematic implementation of enforced prostitution and mass rape of "comfort women." This system was planned, ordered, established, and controlled by Japan for the benefit of its soldiers and certain others. Sexual

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Legal Responsibility?, 32 Colum. J. Transnat'l L. 533 (1995), WL 32 CLMJTL 533), at *542.

[2]Radhika Coomaraswamy *Report of the Special Rapporteur on the mission to the Democratic People's Republic of Korea, the Republic of Korea and Japan on the issue of military sexual slavery in wartime,* U.N. Economic and Social Council, 52nd Sess., Agenda Item 5(a), at 7, U.N. Doc. E/CN.4/53/Add.1 (1996), found at http://www1.umn.edu/humanrts/commission/country52/53-add1.htm

Slavery is a violation of customary international law.[3]

CLASS ALLEGATIONS

28. This action is brought on behalf of a class of women who were recruited by force, coercion, or deception into sexual slavery at any time from 1931 to 1945 by the Japanese Government, and/or agents or co-conspirators of the Japanese Government, and their heirs.

29. The exact number of the members of the class, as identified above, is not known to Plaintiffs, but it is estimated that members of the class number in the hundreds or thousands and are so numerous that joinder of individual members herein is impracticable. The identities of members of the class can be derived from records of the Government of Japan, non-governmental organizations, and advocacy organizations set up to aid "comfort women."

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[3] The following treaties, among others, are evidence of *jus cogens* prohibitions against sexual slavery: Hague Convention Respecting the Laws and Customs of War on Land and the Regulations annexed thereto of 1907, International Convention for the Suppression of the Traffic in Women and Children of 1921, Convention to Suppress the Slave Trade and Slavery of 1926, ILO Convention No. 29 on Forced Labor (1930), 1933 International Convention on the Suppression of Traffic in Women of Full Age, Geneva Convention Relative to the Protection of War Victims of 1949, Nuremburg Charter and Control Counsel Law No. 10, and Charter of the International Military Tribunal for the Far East in Tokyo.

30. There are questions of fact and law common to the class, which predominate over any questions affecting only individual members. Common questions of fact and law include:

a. Did the Japanese Government and/or its agents or co-conspirators implement a system of sexual slavery that victimized plaintiffs and members of the class?

b. Did the use of plaintiffs and members of the class as "comfort women" constitute war crimes and/or crimes against humanity?

c. Do Defendant's actions give rise to liability under the Alien Tort Claims Act?

d. As a result of the wrongful conduct of the Government of Japan, is the plaintiff class entitled to exemplary or punitive damages?

31. The claims of the named Plaintiffs are typical of the claims of the plaintiff class, in that the claims of all members of the class depend on a showing of the acts and/or omissions of Defendant, as described below, which give Plaintiffs the right to seek the relief sought herein.

32. There is no conflict as between the named Plaintiffs and the members of the class that they seek to represent with respect to this action, or with respect to the claims for relief set forth herein.

33. Plaintiffs are able to and will fairly and adequately

protect the interests of the class.

34. Counsel for plaintiffs have extensive experience in class action litigation.

35. A class action is superior to the other available methods for fair and efficient adjudication of the controversy.

36. Certification of the plaintiff class is appropriate under Fed. R. Civ. P. 23(b)(1), (2) and/or (3).

LEGAL AND EQUITABLE TOLLING

37. No statute of limitations applies to the acts and claims alleged herein pursuant to the 1968 Convention for the Non-Applicability of a Statute of Limitations for War Crimes and Crimes Against Humanity. The principle that there is no statute of limitations on war crimes or crimes against humanity has also attained the status of customary international law.

38. No statute of limitations has begun to run on the causes of action stated herein because members of the plaintiff class have remained in ignorance of vital information essential to pursue their claims, without any fault or want of diligence or due care on their part.

39. Defendant misrepresented and/or concealed vital information from the Class members.

40. Defendant systematically destroyed records of the operation of the military rape camps where "comfort

women" were housed.

41. Defendant has denied involvement in and liability for the operation of the rape camps.

42. Additionally, at no time since the end of the Second World War did Defendant make any reasonable attempt to compensate members of the class, despite the knowledge that its behavior violated the laws of humanity and international law. Defendants are therefore estopped from interposing any type of time bar defense to these claims.

COMMON FACTUAL ALLEGATIONS

Background

43. Beginning in 1931 or 1932, during the Asian/Pacific wars, the Japanese Government began instituting a system of sexual slavery throughout the territories it occupied.[4]

44. Young women were taken from Japanese-occupied territories and shipped all over East Asia to serve as "comfort women." They were subjected to pre-meditated mass rapes by Japanese military men and others selected by Japan.

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[4]George L. Hicks, *Comfort Women: Japan's Brutal Regime of Enforced Prostitution in the Second World War,* 45 (W.W. Norton & Co., 1995) and Ustinia Dolgopol & Snehal Paranjape, *Comfort Women: an Unfinished Ordeal, Report of a Mission,* 31 (International Commission of Jurists 1994).

45. Deception and coercion were common in the recruitment of "comfort women" – who were mostly taken from poverty-stricken families – and many were simply abducted by brute force.[5] The girls and women taken were as young as eleven years old.[6] Virgins were actively sought.[7] The women were often removed to remote places where they had no linguistic or cultural ties so that they could more easily be isolated from any prospect of sympathy or help.

46. In Korea, in addition to recruitment by force and deception, "comfort women" were recruited under the official labor draft, instituted to strengthen the Japanese war effort (It was called kunro ("labor") or Yeoja ("woman") Jungshindae (in Japanese, Teishintai), meaning "Voluntarily Committing Body

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[5] Hicks, *supra*, at 195 (Hicks cites as one example the 1983 memoirs of Yoshida Seiji, *My War Crimes: The Forced Draft of Koreans*, which descibe his involvement, as Mobilisation Department Head in Shimonoseki, in the coercive recruitment of "comfort women."); See also Boling, *supra*, at 547 (quoting Seiji as saying "It was just like kidnapping.")

[6] Recent evidence indicates that Korean primary school girls were conscripted to serve as "comfort women." David Andrew Schmidt, *Ianfu – The Comfort Women of the Japanese Imperial Army of the Pacific War: Broken Silence* (Lewiston: The Edwin Mellon Press, 2000) at 36.

[7] Dolgopol and Paranjape, *supra*, at 42.

Corps for Labor." This is a phrase coined by the Japanese that denotes the devoting of one's entire being to the cause of the Emperor.) Many young women recruited or lured to work in the factories were diverted by Japan into sexual slavery. The same occurred to many women originally drafted to work in factories.

47. The number of "comfort women" has been estimated at 200,000.[8] The women were drawn primarily from those the Japanese considered racially inferior. The majority came from Korea, then a Japanese colony, and another large percentage came from Japanese-occupied China. Others were taken from Taiwan and other Japanese-occupied territories such as the Philippines, and the Dutch East Indies. In addition, some women who were Netherlands subjects were included in the immense roundup. Victims included some women suspected by the Japanese military to be associated with underground resistance forces in China and other occupied or colonized territories, or related to such resistance fighters.

48. The women were raped repeatedly -- by some accounts by 30 or 40 men each day -- day after day. Torture and beatings were common. The women existed under miserable conditions, living in tiny

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[8] Gay McDougal *Systematic Rape, Sexual Slavery and Slavery-like Practices During Armed Conflict: Update to the Final Report,* U.N. Economic and Social Council, 52nd Sess., Agenda Item 6(a), U.N. Doc. E/CN.4/Sub.2/21 (2000) at par. 68; Dolgopol and Paranjape, *supra,* at 43.

cubicles, and often with inadequate food and medical care. For some, the servitude lasted as long as eight years.

49. By the end of World War II, the use of "comfort women" was a widespread and regular phenomenon throughout Japan-controlled East Asia.[9]

The Involvement of the Japanese Government

50. The "comfort woman" program of sexual slavery was a systematic and carefully planned system ordered and executed by the Japanese Government.[10]

51. According to a report of the United Nations Special Rapporteur on Violence against women, its causes and consequences, Ms Radhika Coomaraswamy:

> The first comfort stations under direct Japanese control were those in Shanghai in 1932, and there is firsthand evidence of official involvement in their establishment. One of the commanders of the Shanghai campaign, Lieutenant General Okamura Yasuji, confessed in his memoirs to have been the original proponent of comfort stations for the military ... a number of Korean women from a Korean community in Japan were sent to the province by the Governor of Nagasaki Prefecture. The fact that they were sent from

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[9] Coomsawarmy, *supra,* at 2.

[10] Hicks, *supra*, at 197.

Japan implicates not only the military but also the Home Ministry, which controlled the governors and the police who were later to play a significant role in collaborating with the army in forcibly recruiting women.[11]

52. The Japanese Army regulated conditions at the "comfort stations," issuing rules on working hours, hygiene, contraception, and prohibitions on alcohol and weapons.[12] The rank of the soldier determined the length of time allowed for a visit, the price paid, and the hours at which the soldier was entitled to visit the comfort station.[13] According to the testimony of survivor quoted in the report of the United Nations Special Rapporteur, from 3 to 7pm each day she had to serve sergeants, whereas the evenings were reserved for lieutenants.[14]

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[11] Coomsawarmy, *supra,* at 5.

[12] *See, e.g.* Coomsawarmy, *supra,* at 4 and 8 (citing, for example, the 10 Day Report of the 21st Army Unit of the Japanese Army stationed at Kwandong, China from 11 to 21 April, 1939).; Katharine Parker and Jennifer F. Chew *Compensation for Japan's World War II War-Rape Victims,* 17 Hastings Int'l & Comp. L. Rev., WL 17 HSTICLR 497, at *502.; Boling, *supra,* at *543; Dolgopol and Paranjape, *supra,* at 24 - 40.

[13] Parker and Chew, *supra,* at 502.

[14] Testimony of Bok Sun Kim, quoted in Coomsawarmy, *supra,* at 12.

53. "Comfort women" were recorded on Japanese military supply lists under the heading of "ammunition."[15]

54. Army doctors carried out health checks on the "comfort women," primarily to prevent the spread of venereal disease.[16]

55. Japanese soldiers using the "comfort women" were normally charged a fixed price. The prices varied by the women's nationality.[17] At least a portion of the revenue was taken by the military.

56. The "comfort women" system required the deployment of the vast infrastructure and resources that were at the government's disposal, including soldiers and support personnel, weapons, all forms of land and sea transportation, and engineering and construction crews and matériel.

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[15] Boling, *supra*, at *543

[16]Coomsawarmy, *supra,* at 7; McDougal, *supra,* at 5 (citing Japanese government documents); Dolgopol and Paranjepe, *supra*, at 31 (Citing Japanese Army regulations in the "South Sector" of China providing that a senior medical officer would conduct a venereal examination on Thursday morning of each week.).

[17]*See, e.g.*. Boling, *supra*, at 543, citing an example of "one yen for Chinese, one and a half yen for a Korean woman, and two yen for a Japanese woman."

57. The government of Japan shipped girls and women like military supplies throughout the vast area of Asia and the Pacific that Japanese troops controlled, from the Siberian border to the equator including: China (including Guangdong and Manchuria), Hong Kong, Taiwan, Korea, Amoi, French Indochina, the Philippines, Malaya, Singapore, British Borneo, the Dutch East Indies, Burma, Thailand, East New Guinea, New Britain, Trobriand, Okinawa, and Sakhalin, as well as the Japanese islands of Kyushu, Honshu and Hokkaido. The Japanese government built, operated, and controlled hundreds of "comfort houses" in these areas.

The Women's Ordeal

58. The women were the victims of multiple rapes on a daily basis for many years, and suffered serious health effects as a result, including permanent damage to their reproductive organs and urinary tracts from violent physical abuse and sexually transmitted diseases.

59. Those who attempted to resist, and some who did not, were beaten, tortured, or mutilated; sometimes they were murdered.[18] The treatment of "comfort women" was consistent with Japan's view of the racial inferiority of the populations from which the women were drawn.

60. Only about 25% to 30% of the comfort women are

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[18] Dolgopol and Paranjape, *supra,* at 49 - 51; Parker and Chew, *supra*, at 505.

believed to have survived the war. Some were murdered, and many others died from lack of medical treatment, botched abortions, disease and malnutrition, and during beatings. Others committed suicide.

61. One survivor testified to the U.N. special rapporteur that she "was ordered to service high-ranking officials, and as time passed, and as we were more and more 'used' we served lower-ranking officers. If a woman got a disease, she usually vanished."[19]

62. At some "comfort stations," the women were given Japanese names and required to speak Japanese and entertain the men with Japanese songs. Korean comfort women were referred to as chosenppi ("Korean vagina") or other derogatory Japanese terms for Koreans.

63. At the end of the war, many "comfort women" were killed by retreating troops or simply abandoned. For example, in one case in Micronesia, the Japanese Army killed 70 "comfort women" in one night just before the arrival of American troops.[20] Others were abandoned, sometimes in dense jungles, when their

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[19]Another survivor testified that women "who were found disease-stricken were killed and buried in unkown places." Coomsawarmy, *supra,* at 12. See also Boling, *supra,* at 543 ("Those who contracted venereal disease were left like rubbish or killed.").

[20] Coomsawarmy, *supra,* at 5.

Japanese captors fled.[21] Many of those died of starvation and disease. Others did not know where they were, were hundreds of miles from their homes, had no money, and no means to return.

After the War

64. Survivors who made it home returned to what were often lives of isolation and societal rejection, compounded by deeply instilled feelings of guilt and shame. Many were ostracized, beaten or even killed. Most of those still living are extremely poor and suffer from severe physical and psychological problems. Many could not marry. Many found themselves unable to bear children as a result of their mistreatment. Many suffer from sexually transmitted diseases contracted during their servitude and from drug addictions related to their wartime experiences. Sleep disorders, like insomnia and fearful nightmares, are common. They suffer grievously to this day.[22]

65. A number of organizations have been established to provide assistance former "comfort women." For example, the House of Sharing was founded in Korea in 1992 as a shelter for the homeless survivors of Japanese military sex slavery. It presently maintains a residence in Kyongi Province, Republic of Korea, for twelve survivors who are ill and have no family

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[21] Dolgopol and Paranjape, *supra,* at 29.

[22]Hicks, *supra*, at 20; Dolgopol and Paranjpae, *supra*, at 51.

members to care for them. The Korean Council for Women Drafted for Military Sex Slavery, located in Seoul, engages in several activities on behalf of former "comfort women," including providing services and support for them. In 1997, a former minister in the Republic of Korea government founded the "Daegu Citizen Forum for Halumni". Its activities are principally focused on providing care for surviving victims. It seeks to do many things that family members might have done, such as tending to them when they are sick, celebrating birthdays, mourning with them after a death, and similar activities. It presently cares for seven victims living in Taegu City and thirteen others living in other parts of Kyongbuk Province. In the Philippines, Lila-Pilipina is an organization of Filipino "comfort women" and wartime rape survivors. Among its other programs, it engages in welfare assistance and sponsors an emergency shelter and counseling center. The Asian Centre for Women's Human Rights (ASCENT), located as well in the Philippines, also maintains programs relating to the welfare of former "comfort women." The Tapei Women Rescue Association provides comparable services for surviving victims in Taiwan.

66. On August 14, 1991, a South Korean woman named Kim Hak Soon became the first former comfort woman to give public testimony. Since then, some 190 women in Korea alone have come forward. Of these, forty, including Kim Hak Soon herself, have passed away. The Japanese government's initial reaction to the brutal history first disclosed by Kim Hak Soon was to deny that it was involved.

The Response of the Japanese Government

67. Japan has issued a series of denials about the extent of its involvement in the sexual slavery of the "comfort women."

68. In 1990, in response to calls for an investigation from women's organization in the Republic of Korea and from a member of the Japanese Diet, the Japanese Government responded that the "comfort women" issue was the work of neither the Japanese Government nor the military, but of private entrepreneurs.[23]

69. In 1991, in response to a letter from the Korean Women's Association demanding an apology, a memorial and a thorough inquiry, the Japanese Government stated that there was no evidence of the forced drafting of Korean women as "comfort women," and thus no need for an apology, memorial or disclosures by the Government of Japan.[24] The response also suggested that the "comfort women" were voluntary prostitutes.[25]

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[23] Dolgopol and Paranjape, *supra,* at 12.

[24] Dolgopol and Paranjape, *supra,* at 13.

[25] David Andrew Schmidt, *Ianfu – The Comfort Women of the Japanese Imperial Army of the Pacific War: Broken Silence* (Lewiston: The Edwin Mellon Press, 2000) at 22.

70. In 1992, Japan's Chief Cabinet Secretary expressed "deep remorse" and admitted for their first time that the Japanese Imperial Army was in some way involved in the running of comfort facilities. Later that year, the Government released 127 documents implicating the Japanese military in the use of "comfort stations."[26] However, Japan continued to deny an official role in "recruiting" the women.

71. Although individual representatives of the Japanese Government have issued a series of apologies, they have not spoken for the government as a whole and Japan continues to deny the full nature and extent of its responsibility for the atrocities. Japan has made no reparations to the victims, no acknowledgment of legal liability, and has undertaken no prosecutions.[27]

72. The Japanese Government destroyed many relevant documents immediately after the war[28], and Japan has

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[26] Dolgopol and Paranjape, *supra,* at 13 - 14. The documents were released in connection with an official study on "comfort women" by the Japanese Cabinet Councillors' Office on External Affairs. McDougal, *supra,* at paragraph 2.

[27] McDougal, *supra*, at paragraph 72.

[28] See, e.g., Parker and Chew, *supra,* at 502; Yvonne Park Hsu, *"Comfort Women" from Korea: Japan's World War II Sex Slaves and the Legitimacy of their Claims for Reparations*, 2 Pac. Rim L. & Policy J. 97, 100 (1993) (referring to an August 15, 1945, order by the Japanese Minister of War to every Army headquarters to destroy documents prior

been unwilling to release the bulk of whatever documents remain.

Conspiracy to Exploit "Comfort Women"

73. Through the systematic enslavement of "comfort women, " Defendant masterminded a conspiracy to dominate, enslave and exploit persons considered of "inferior" races. Defendant, its agents, and unnamed co-conspirators willingly solicited, coerced, and abducted women to be forced into sexual slavery and actively participated in and promoted the development and continuation of the system of military rape camps.

74. Since the end of the war, Defendant has engaged in ongoing and continuing conduct to wrongfully conceal its involvement in the systematic sexual slavery of the "comfort women." Defendant has also engaged in continuing wrongdoing by refusing to provide true compensation to the "comfort women."

75. Defendant is jointly and severally liable for the wrongdoing alleged herein.

CAUSES OF ACTION

76. Plaintiffs reallege each and every paragraph set forth above as if fully set forth herein.

77. Defendant committed war crimes and crimes against

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to Japan's surrender.)

humanity, and violated international treaties and customary international law enforceable in this Court as federal common law and the law of nations.

78. Defendant masterminded a conspiracy with other unnamed co-conspirators to commit acts that constituted war crimes and crimes against humanity, and violations of international treaties and customary international law enforceable in this Court as federal common law and the law of nations.

79. Defendant committed acts that constitute torts in violation of the law of nations, violating the Alien Tort Claims Act, 28 U.S.C. §1350.

80. Defendant committed acts that constitute enforced prostitution in violation of international law and domestic law.

81. Defendants promoted, aided and abetted acts that constitute the crime of rape in violation of international law and domestic law.

82. By establishing an extensive system of sexual slavery under inhuman conditions, Defendant is liable to plaintiffs and the Class for compensatory and punitive damages.

WHEREFORE, Plaintiffs pray that judgment be entered against the Defendant as follows:

(a) Certifying this action as a class action pursuant to Rule 23 of the Federal Rules of Civil Procedure, and designating plaintiffs as class representatives and counsel

for plaintiffs as counsel for the Class;

(b) Declaring that Defendant violated international treaties and customary international law enforceable in this court as federal common law and the law of nations;

(c) Declaring that Defendant violated the Alien Tort Claims Act and prohibitions against enforced prostitution and rape;

(d) Directing Defendants to make available forthwith all documents or other records related to the operation of military rape camps and/or "comfort women;"

(e) Awarding plaintiffs and the Class compensatory and punitive damages arising out of the unlawful behavior of Defendants;

(f) Awarding the costs of bringing this action, including an award of attorneys' fees, expert fees and other costs; and

(g) Granting such other and further relief as shall seem just to the Court.

JURY DEMAND

Plaintiffs hereby demand a jury trial on all issues so triable.

Date: September 18, 2000

Respectfully submitted,

/s/

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IN THE

Supreme Court of the United States

HWANG GEUM JOO, *et al.*,

Petitioners,

v.

GOVERNMENT OF JAPAN,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the D.C. Circuit correctly held that the commercial activity exception of the Foreign Sovereign Immunities Act of 1976 ("FSIA"), 28 U.S.C. §§ 1602 *et seq.*, does not apply retroactively to acts that occurred before 1952, where applying that exception retroactively would upset the settled expectations of foreign sovereigns that they would not be subject to suit in the United States for such acts.

2. Whether the D.C. Circuit correctly held—as has every other circuit court to consider the issue—that there is no *jus cogens* exception to sovereign immunity.

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BRIEF IN OPPOSITION

INTRODUCTION

The Treaty of Peace With Japan, signed Sept. 8, 1951, formally concluded World War II in the Pacific theater. That Treaty, entered into by Japan, the United States, and forty-four other Allied nations, expressly settled all war-related claims of the signatory nations and their nationals arising out of the actions of Japan and its nationals during World War II. *See* Treaty of Peace With Japan, Sept. 8, 1951, 136 U.N.T.S. 45 (the "San Francisco Treaty"). As the court of appeals below recognized, the Treaty "embodies the foreign policy determination of the United States that *all* claims against Japan arising out of its prosecution of World War II are to be resolved through intergovernmental settlements." Pet. App.

10a (emphasis added; quotation omitted). That policy has proved successful, as Japan has not only become a productive and peaceful member of the international community, but one of this Nation's most important and trusted allies.

More than fifty years after the fact, petitioners (a group of foreign nationals who reside abroad) brought suit in the United States against Japan (a foreign sovereign) for war reparations arising out of events that occurred in Asia during World War II.[1] As a basis for subject matter jurisdiction, plaintiffs invoked the "waiver" and "commercial activity" exceptions of the Foreign Sovereign Immunities Act of 1976 ("FSIA"), 28 U.S.C. §§ 1602 *et seq*. The District Court dismissed the complaint, and the D.C. Circuit affirmed. Applying this Court's now familiar retroactivity analysis, the D.C. Circuit held that the FSIA's commercial activity exception did not apply retroactively to claims against Japan arising out of wartime events that occurred before 1952, when the United States adhered to the "absolute" theory of sovereign immunity. Applying binding circuit precedent, the D.C. Circuit also held that Japan had not implicitly waived its immunity by violating *jus cogens* norms. Because petitioners had failed to establish that one of the FSIA's exceptions to immunity applied, "the courts of the United States simply [were] not authorized to hear their case." Pet. App. 16a.

Contrary to petitioners' assertions, the decision below does not conflict with any of this Court's decisions. Indeed, the D.C. Circuit faithfully applied this Court's retroactivity precedents. Nor does the decision below conflict with the decision of any other court. Petitioners allege a conflict with the Ninth Circuit's decision in *Altmann* v. *Republic of*

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[1] Although not relevant to the legal issues here, Japan has expressed publicly on numerous occasions its sincere apologies and remorse for the grave affronts to the honor and dignity of former "comfort women."

Austria, 317 F.3d 954 (9th Cir. 2002), *cert. granted*, 124 S. Ct. 46 (2003) (No. 03-13). As the D.C. Circuit expressly held, however, this case is distinguishable from *Altmann* in several key respects, including that there "was no similar treaty [to the San Francisco Treaty] with Germany or Austria." Pet. App. 11a. Indeed, in light of the D.C. Circuit's recognition that the Treaty embodies a specific policy that all claims relating to the wartime actions of Japan's former military are to be resolved through intergovernmental negotiations rather than litigation, this case was properly dismissed regardless of how this Court rules in *Altmann*. Because there is no genuine conflict with *Altmann* or any other case, and because numerous alternative grounds exist for affirmance in any event, there is no reason for the Court to grant certiorari or even hold this case pending its decision in *Altmann*. The petition should be denied.

STATEMENT OF THE CASE

At the end of World War II, the United States recognized that it would be impossible for Japan to make full reparation for the damage its former military had caused. Determined not to repeat the mistakes of the Treaty of Versailles—which contained onerous reparations provisions that were largely believed to have led directly to the rise of fascism in Europe—the United States adopted a policy of resolving all Japanese war-related claims through government-to-government negotiations, with the goal of reintegrating Japan into the community of democratic nations without imposing crushing financial liability. *See generally Mitsubishi Materials Corp.* v. *Superior Court*, 6 Cal. Rptr. 3d 159, 166-169 (Ct. App. 2003); *In re World War II Era Japanese Forced Labor Litig.*, 114 F. Supp. 2d 939, 946-947 (N.D. Cal. 2000), *aff'd on other grounds*, 324 F.3d 692 (9th Cir.), *cert. denied*, 124 S. Ct. 105 (2003).

The San Francisco Treaty was the culmination of that policy. Among other things, the Treaty expressly waived "all

* * * claims of the Allied Powers and their nationals arising out of any actions taken by Japan and its nationals in the course of the prosecution of the war." *Id.* art. 14(b). In return, Japan agreed to numerous conditions and restrictions, including a reciprocal waiver and the right of the Allied Powers to seize Japanese assets within their respective jurisdictions. *Id.* art. 14(a). The Treaty further provided that Japan would resolve the war-related claims of other nations through bilateral treaties "on the same or substantially the same terms." *Id.* art. 26. These provisions (and others) accomplished the foreign policy goals of the drafters, as Japan has once again become an accepted member of the community of democratic nations.

Proceedings Below. More than a half a century after the end of World War II, petitioners filed this suit in the United States against Japan seeking war reparations arising out of events that occurred in Asia during the war. Petitioners invoked subject matter jurisdiction under the FSIA's "waiver" and "commercial activity" exceptions to sovereign immunity. *See* 28 U.S.C. §§ 1605(a)(1), (a)(2). Among other things, petitioners alleged that Japan had implicitly waived its immunity to suit in the United States by violating *jus cogens* norms—*i.e.*, "principle[s] of international law * * * accepted by the international community of States as a whole as a norm from which no derogation is permitted." *Princz* v. *Federal Republic of Germany*, 26 F.3d 1166, 1173 (D.C. Cir. 1994), *cert. denied*, 513 U.S. 1121 (1995) (quotation omitted). Petitioners raised that argument even though the D.C. Circuit (like every other circuit court to have considered the argument) had expressly rejected it in *Princz*.

Although petitioners attempted to shoehorn their claims into the FSIA's commercial activity exception by characterizing Japan's alleged conduct as "commercial" in nature, their complaint tells a different story. There, petitioners allege "war crimes," "crimes against humanity," and "atrocities." Pet. App. 93a, 110a, 115a, 127a, 128a-129a. They

further allege that Japan engaged in a "premeditated master plan" to force women into "sexual slavery," which was "planned, ordered, established, and controlled by Japan for the benefit of its [military] and certain others." Pet. App. 92a, 112a. Petitioners assert that this was a "systematic and carefully planned system ordered and executed by the Japanese Government." Pet. App. 119a.

The war crimes are described as taking place in "military" camps, sometimes "[n]ear the front lines," that were either "appropriated by the Japanese military" or "built by the army," with conditions "regulated" by the Japanese Army Pet. App. 112a, 115a, 120a, 128a, 130a. The complaint alleges that women "were recruited by force, coercion, or deception into sexual slavery for the Japanese military," and were "coerced into joining the war effort." Pet. App. 111a. It also alleges that some were "recruited under the official labor draft, instituted to strengthen the Japanese war effort," and that they were "recorded on military supply lists" and "shipped * * * like military supplies." Pet. App. 117a, 121a, 122a. The complaint further alleges that all these military activities "required the deployment of the vast infrastructure and resources that were at the government's disposal, including soldiers and support personnel [and] weapons." Pet. App. 121a.

District Court Decision. Japan moved to dismiss the complaint on numerous alternative grounds: (1) that Japan was entitled to sovereign immunity; (2) that the complaint presented non-justiciable political questions; (3) that petitioners' claims were barred by the applicable statute of limitations; (4) that petitioners had no private right of action under the Alien Tort Claims Act ("ATCA"), 28 U.S.C. § 1350; (5) that the comity of nations doctrine required dismissal; and (6) that the complaint should be dismissed under the doctrine of *forum non conveniens*. In particular, Japan argued that the FSIA's commercial activity exception does not apply retroactively to war reparations claims against

Japan involving events that occurred before 1952, when the United States adhered to the "absolute" theory of sovereign immunity.

The District Court dismissed the complaint. Without deciding whether the FSIA applies retroactively to events that occurred before 1952, the court held that Japan was nevertheless entitled to immunity. Applying the binding-circuit precedent of *Princz*, the court rejected petitioners' argument that Japan had implicitly waived immunity by violating *jus cogens* norms. *See* Pet. App. 30a-31a. The court further held that the commercial activity exception did not apply because the conduct alleged "certainly is not commercial in nature." Pet. App. 36a. Rather, the alleged conduct—which "might be characterized properly as a war crime or crime against humanity"—" 'boils down' to an abuse * * * of Japan's military power," that is " 'peculiarly sovereign in nature.' " Pet. App. 36a-37a (quoting *Saudi Arabia* v. *Nelson*, 507 U.S. 349, 361 (1993)). Such conduct, the court held, is "not typically engaged in by private players in the market," and thus is "not a commercial activity within the meaning of the FSIA." Pet. App. 36a.

The District Court also dismissed the complaint on the alternative ground that petitioners' claims were barred by the political question doctrine. Noting that "the series of treaties signed [by Japan] after the war was clearly aimed at resolving all war claims against Japan," the court held that "[t]here is no question that this court is not the appropriate forum in which plaintiffs may seek to reopen those discussions nearly half a century later." Pet. App. 43a-44a. Rather, petitioners' claims were matters to be addressed solely "at the government-to-government level." Pet. App. 44a.

The United States government, through the Departments of State and Justice, supported Japan's position both in the District Court and on appeal, taking the position that the complaint should be dismissed because Japan was entitled to

sovereign immunity and because the San Francisco Treaty embodies the foreign policy determination of the United States that all claims against Japan arising out of its prosecution of World War II are to be resolved through intergovernmental settlements.

D.C. Circuit Decision. The D.C. Circuit affirmed the dismissal of the complaint. Addressing the question whether the FSIA's commercial activity exception applies retroactively to claims against Japan involving wartime events that occurred before 1952, the court held that it does not. As the court recognized, "[p]rior to 1952, the courts of the United States generally followed the doctrine of 'absolute immunity.' " Pet. App. 5a. It was not until 1952, in the so-called "Tate Letter," that the United States adopted the "restrictive" theory of immunity, under which " 'immunity is confined to suits involving the foreign sovereign's public acts, and does not extend to cases arising out of a foreign state's strictly commercial acts.' " *Id.* (quoting *Verlinden B.V.* v. *Central Bank of Nigeria*, 461 U.S. 480, 487 (1983)).

Applying this Court's two-step retroactivity analysis, the D.C. Circuit first considered "whether the commercial activity exception * * * has retroactive effect." Pet. App. 6a. The court answered that question in the affirmative: "application of the commercial activity exception to events that occurred prior to 1952 would impose new obligations upon, come without fair notice to, and upset the settled expectations of, foreign sovereigns." Pet. App. 7a. As the court explained, "the United States clearly changed its position in 1952 when it adopted the doctrine of restrictive immunity." *Id.* "Theretofore a foreign sovereign justifiably would have expected any suit in a court of the United States—whether based upon a public or a commercial act—to be dismissed unless the foreign sovereign consented to the suit." *Id.* Thus, the court held, "because Japan had a settled expectation in the 1930s and 1940s that its commercial activities would not be subject to suit in a court of the United States,

application of the commercial activity exception of the FSIA to acts occurring then would clearly be retroactive in effect." Pet. App. 8a.

In so holding, the D.C. Circuit expressly "recognize[d] the Ninth Circuit [had] recently held [in *Altmann*] that the expropriation exception to the FSIA * * * may be applied retroactively to activities of the German and Austrian governments in the 1930s and 1940s." Pet. App. 10a. The D.C. Circuit held, however, that "[r]egardless whether we would follow the *Altmann* decision, we do not find its reasoning applicable to this case because of the 1951 Treaty of Peace with Japan." *Id.* As the court explained, the Treaty "manifests the parties' intent to resolve matters arising from World War II without involving the courts of the United States (or of any signatory nation)." *Id.* "As a result, Japan could not have expected to be sued in a court of the United States by either an Allied national or a Chinese or Korean national for a claim arising out of World War II because the Allied Powers had respectively waived the claims of their nationals and expressed a clear policy of resolving the claims of other nationals through government-to-government negotiations." Pet. App. 11a. The court held that "[b]ecause there was no similar treaty with Germany or Austria, and therefore no similar settled expectation," the Ninth Circuit's decision in *Altmann* "is not relevant to the present case." *Id.*

The D.C. Circuit further noted that "*Altmann* is not relevant to the present case for a second reason." *Id.* In 1949, the State Department issued the so-called *Bernstein* letter, specifically stating that:

> The policy of the Executive, with respect to claims asserted in the United States for the restitution of identifiable property (or compensation in lieu thereof) lost through force, coercion, or duress as a result of the Nazi persecution in Germany, is to relieve American courts

> from any restraint upon the exercise of their jurisdiction *to pass upon the validity of the acts of Nazi officials.*[2]

As the D.C. Circuit observed, there does not appear to be "any similar statement of policy regarding the alleged acts of Japan in this case." Pet. App. 12a. Thus, the court concluded, "[t]he lack of such a statement not only distinguishes this case from *Altmann*; it also gives us all the more reason to believe the Executive wanted to handle claims against Japan arising out of World War II solely at the level of intergovernmental negotiations." *Id.*

Turning to the second step in its retroactivity analysis, the court considered "whether the Congress manifested a clear intent to overcome the presumption against retroactive legislation," and held that there is "no clear indication" that Congress intended the FSIA's commercial activity exception "to apply to events occurring before 1952." *Id.* In so holding, the court specifically rejected petitioners' argument that Congress's repeal, concurrent with the passage of the FSIA, of a provision conferring diversity jurisdiction in cases brought by United States citizens against foreign states, *see* 28 U.S.C. § 1332 (1976), suggests that Congress intended the FSIA to apply retroactively. The court held that although that might be true "as applied to events occurring between 1952 and 1976," Congress's repeal of that provision "cannot provide a basis * * * for altering sovereign immunity as it existed prior to 1952." Pet. App. 13a. "The most that can be said is that in enacting the FSIA the Congress intended to incorporate the doctrine of restrictive immunity into federal

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[2] *See* Letter from Jack B. Tate, Acting Legal Advisor, Department of State, to the Attorneys for the Plaintiff in Civil Action No. 31-555 in the U.S. District Court for the Southern District of New York (Apr. 13, 1949) (emphasis added), *reprinted in Bernstein* v. *N.V. Nederlandsche-Amerikaansche*, 210 F.2d 375, 376 (2d Cir. 1954).

law, not that the doctrine be applied to events that occurred before the United States first adopted it." *Id.*

The D.C. Circuit also rejected petitioners' argument that congressional intent to apply the FSIA retroactively can be found in the FSIA's preamble, which states that "[c]laims of foreign states to immunity should henceforth be decided by courts of the United States and of the States in conformity with the principles set forth in [the Act]." 28 U.S.C. § 1602. That language, the court held, "falls far short" of expressing a "clear intent" to apply the FSIA retroactively. Pet. App. 13a. Instead, "the most probable meaning" of the preamble is that future claims of immunity would be decided by the courts rather than the State Department. *Id.*

Having held that the FSIA's commercial activity exception does not apply retroactively to events that predate the Tate Letter, the D.C. Circuit quickly disposed of petitioners' remaining arguments in support of jurisdiction. The court held that petitioners' claims that Japan had impliedly waived immunity by violating *jus cogens* norms was foreclosed by the court's decision in *Princz*, *supra*, where the court "soundly rejected that argument." Pet. App. 14a. The court concluded that there was no need to revisit *Princz*, particularly given that two other circuits had since followed it. Pet. App. 15a (citing cases).

Finally, the court noted that the parties disputed whether the ATCA creates a cause of action for violations of customary international law. The court held that it "need not reach this question," because "whatever else the [ATCA] might do, it does not provide the courts with jurisdiction over a foreign sovereign." *Id.* Rather, "[o]nly the FSIA can provide such jurisdiction." *Id.* Because petitioners had failed to establish a "jurisdictional predicate under the FSIA," their claims were required to be dismissed. *Id.*

REASONS FOR DENYING THE WRIT

I. THERE IS NO CONFLICT WITH THIS COURT'S RETROACTIVITY JURISPRUDENCE.

1. Petitioners' contention that the decision below "cannot be reconciled with this Court's retroactivity jurisprudence" is quite mistaken. Pet. 8. Invoking this Court's decision in *Landgraf* v. *USI Film Products*, 511 U.S. 244 (1994), petitioners argue that, because the FSIA is a jurisdictional statute, it applies "in all cases against foreign sovereigns decided subsequent to its enactment." Pet. 8-9. But as the Court subsequently confirmed in *Hughes Aircraft Co.* v. *United States*, 520 U.S. 939, 951 (1997), "[t]he fact that courts often apply newly enacted jurisdiction-allocating statutes to pending cases merely evidences certain limited circumstances failing to meet the conditions for our generally applicable presumption against retroactivity." Thus, as the Court held, "[s]tatutes merely addressing *which* court shall have jurisdiction to entertain a particular cause of action * * * affect only *where* a suit may be brought, not *whether* it may be brought at all." *Id.* (emphases in original). Such statutes "can fairly be said merely to regulate the secondary conduct of litigation and not the underlying primary conduct of the parties." *Id.* By contrast, a statute that "does not merely allocate jurisdiction among forums," but rather "*creates* jurisdiction where none previously existed," "speaks not just to the power of a particular court but to the substantive rights of the parties as well." *Id.* (emphasis in original).[3]

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[3] This distinction underlies the D.C. Circuit's decision in *Creighton Ltd.* v. *Qatar*, 181 F.3d 118 (D.C. Cir. 1999), on which petitioners rely. *See* Pet. 10. There, the court held that application of an FSIA amendment that provided for jurisdiction to enforce arbitral awards against a foreign sovereign to events preceding its enactment was not impermissibly retroactive because the amendment did not "affect the contractual rights of the parties to arbitration *but only the tribunal that may hear a dispute concerning the enforcement of an arbitral award.*" *Id.* at 124 (emphasis added).

As the D.C. Circuit held below, "by qualifying what previously had been the absolute immunity of foreign sovereigns," the FSIA's commercial activity exception " 'creates jurisdiction where none previously existed' and therefore affects the substantive rights of the concerned parties." Pet. App. 9a. If the FSIA, which codifies the restrictive theory of immunity, were applied to events occurring before 1952, it would "create[] jurisdiction where none previously existed" because, prior to 1952, courts did not exercise jurisdiction over foreign sovereigns in suits arising out of "strictly commercial acts." *Verlinden*, 461 U.S. at 487. Accordingly, the decision below, far from conflicting with this Court's retroactivity precedents, is entirely in keeping with them.

2. Petitioners' attempts to demonstrate otherwise are unavailing. Petitioners contend, for instance, that "[u]nlike the provision at issue in *Hughes*, the FSIA does not create or eliminate any substantive causes of action." Pet. 11. But as petitioners elsewhere acknowledge, *see id.*, the provision in *Hughes* "eliminate[d] a defense" to suit. 520 U.S. at 948. As the D.C. Circuit held below, in "creat[ing] jurisdiction where none previously existed," that is just what the FSIA does. Pet. App. 9a. That is, by removing immunity for a foreign sovereign's "strictly commercial acts," the FSIA also "eliminates a defense" to suit. As the Court held in *Hughes*, the elimination of a defense to suit "attach[es] a new disability, in respect to transactions or considerations already past." *Id.* at 948 (quotation omitted).[4]

The D.C. Circuit did not find its own decision in *Creighton* controlling in this case, and there is no basis for invoking this Court's review to resolve a purported intra-circuit conflict in any event.

[4] Petitioners argue that the FSIA "merely addresses *which* courts may entertain cases" against foreign sovereigns, asserting that "Japan was amenable to suit for its commercial acts in other courts" prior to 1952. Pet. 11 & 12 n.8 (emphasis in original). Even assuming that Japan could have been sued prior to 1952 in another foreign country for the war crimes alleged here—and

Petitioners' contention that the FSIA "does not alter the substantive rights or obligations of the parties" is equally without merit. Pet. 9. As this Court held in *Hughes*, statutes, like the FSIA, which "create[] jurisdiction where none previously existed," "speak[] not just to the power of a particular court *but to the substantive rights of the parties as well.*" *Id.* at 951 (emphasis added and omitted). Indeed, this Court has made clear that sovereign immunity is a matter of "*substantive* federal law." *Verlinden*, 461 U.S. at 493 (emphasis added). Not surprisingly, the D.C. Circuit is not alone in holding that application of the FSIA's commercial activity exception to events occurring before 1952 would impair the substantive rights of foreign sovereigns. *See Carl Marks & Co.* v. *Union of Soviet Socialist Republics*, 841 F.2d 26, 27 (2d Cir.) ("retroactive application of the FSIA would affect adversely the USSR's settled expectation, rising to the level of an antecedent right, of immunity from suit in the American courts") (quotation omitted), *cert. denied*, 487 U.S. 1219 (1988); *Jackson* v. *People's Republic of China*, 794 F.2d 1490, 1497-98 (11th Cir. 1986) ("to give the Act retrospective application to pre-1952 events would interfere with antecedent rights of other sovereigns").[5]

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petitioners present no evidence to that effect—petitioners' argument fails. As in *Hughes*, the elimination of sovereign immunity as a defense "essentially creates a new cause of action" by subjecting foreign sovereigns to "previously foreclosed" litigation. 520 U.S. at 950. Thus, regardless of whether Japan could have been sued under the laws of another foreign country, retroactive application of the FSIA to events predating 1952 would subject Japan to an entirely new—and different—cause of action here.

[5] Although petitioners contend that "[a]n expectation of immunity is not a substantive right that will prevent retroactive application of a statute," Pet. 9 n.6, none of the cases they cite stand for that proposition. In *Verlinden*, *supra*, for instance, this Court did not say that foreign sovereign immunity can never be a right, but rather only that it is "not a restriction imposed by the Constitu-

Moreover, to the extent petitioners contend that *only* statutes that "alter substantive rights" may have an impermissible retroactive effect, they are mistaken. Indeed, this Court squarely rejected that contention in *Hughes*. There, the Court made clear that Justice Story's "influential" description of impermissible retroactive legislation—including statutes which " 'take[] away or impair[] vested rights acquired under existing laws' "—"does not purport to define the outer limit of impermissible retroactivity." 520 U.S. at 946-947 (quoting *Society for Propagation of the Gospel* v. *Wheeler*, 22 F. Cas. 756, 767 (C.C.N.H. 1814) (Story, J.) (quotation omitted)). Rather, this Court "has used various formulations to describe the 'functional conceptio[n] of legislative "retroactivity." ' " *Id.* at 947 (quoting *Landgraf*, 511 U.S. at 269).

Although there is no "exclusive definition" of impermissible retroactive legislation, *id.*, "familiar considerations of fair notice, reasonable reliance, and settled expectations" offer

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tion." 461 U.S. at 486. Similarly, in *United States* v. *Alabama*, 362 U.S. 602 (1960), the Court did not opine on whether an expectation of immunity can ever rise to the level of a "right" for purposes of retroactivity. Indeed, in that case declaratory and injunctive relief, not damages, were sought; thus, application of the statute at issue did not raise any retroactivity concerns. *See Landgraf*, 511 U.S. at 273 ("When the intervening statute authorizes or affects the propriety of prospective relief, application of the new provision is not retroactive.").

Petitioners' reliance on *First National City Bank* v. *Banco Para El Comercio Exterior de Cuba*, 462 U.S. 611 (1983), is also misplaced. *See* Pet. 9. In addressing the argument that the FSIA prohibits holding a foreign instrumentality owned and controlled by a foreign government responsible for actions taken by that government, the Court made clear that "the Act was not intended to affect the substantive law determining the *liability* of a foreign state or instrumentality." 462 U.S. at 620 (emphasis added). If applied retroactively here, however, that is just what the FSIA would do, contrary to the intent of Congress. *See supra* at 12 & n.4.

courts "sound guidance." *Landgraf*, 511 U.S. at 270. As the D.C. Circuit concluded below, before 1952 "a foreign sovereign justifiably would have expected any suit in a court of the United States—whether based upon a public or a commercial act—to be dismissed unless the foreign sovereign consented to the suit." Pet. App. 7a. Thus, the court held, "because Japan had a settled expectation * * * that its commercial activities would not be subject to suit in a court of the United States, application of the commercial activity exception of the FSIA to acts occurring then would clearly be retroactive in effect." Pet. App. 8a. *See also Jackson*, 794 F.2d at 1498 ("It would be manifestly unfair for the United States to modify the immunity afforded a foreign state in 1911 by the enactment of a statute nearly three quarters of a century later.").[6]

The Court's decision in *Verlinden*, *supra*, is not to the contrary. *See* Pet. 10.[7] *Verlinden* involved a foreign sover-

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[6] Petitioners contend that the State Department "would [not] have filed a suggestion of immunity on behalf of the Japanese government during the period from 1931 to 1945" because Japan was a belligerent nation. Pet. 15. Petitioners do not cite—and Japan is not aware of—*any* case in which a non-consenting foreign sovereign was denied immunity before 1952 on that basis. Indeed, even after the adoption of the restrictive theory, foreign sovereigns continued to receive immunity in cases "involving the exercise of the power of the police or military of a foreign state." *Nelson*, 507 U.S. at 362 n.5 (citing examples).

[7] Nor do *National City Bank of New York* v. *Republic of China*, 348 U.S. 356 (1955), and *New York & Cuba Mail S.S. Co.* v. *Republic of Korea*, 132 F. Supp. 684 (S.D.N.Y. 1955), suggest otherwise. *See* Pet. 10-11 n.7. In *National City Bank*, this Court held that China was not immune from suit on a counterclaim because it had "freely come as a suitor into our courts," not because the restrictive theory of immunity applied. 348 U.S. at 364. In *New York & Cuba Mail*, the court held that it lacked jurisdiction over Korea based on the State Department's suggestion that a foreign sovereign's property is immune from attachment

eign's alleged breach of a letter of credit—*i.e.*, a "strictly commercial act[]." 461 U.S. at 487. Since the adoption of the restrictive theory of immunity in 1952, foreign sovereigns have been subject to suit in the United States for such acts. Thus, applying the FSIA's commercial activity exception to a commercial act that occurred just prior to its enactment would not "impose new obligations upon, come without fair notice to, and upset the settled expectations of, foreign sovereigns." Pet. App. 7a. The same is not true with respect to commercial acts that occurred before 1952, when a foreign sovereign "justifiably would have expected any suit in a court of the United States—whether based upon a public or a commercial act—to be dismissed unless the foreign sovereign consented to the suit." *Id.*

II. AS THE D.C. CIRCUIT HELD, THIS CASE IS DISTINGUISHABLE FROM *ALTMANN* IN SEVERAL KEY RESPECTS.

There is likewise no conflict between the decision below and the Ninth Circuit's decision in *Altmann*. The D.C. Circuit expressly distinguished *Altmann*, holding that "[w]e do not find [the Ninth Circuit's] reasoning applicable to this case." Pet. App. 10a. Indeed, even petitioners acknowledge that the two cases involve "related," not identical, issues. Pet. i. As explained below, this case differs from *Altmann* in several key respects.

1. First, as discussed above, the 1951 San Francisco Treaty expressly extinguished "all * * * claims of the Allied Powers and their nationals arising out of any actions taken by Japan and its nationals in the course of the prosecution of the

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and seizure. 132 F. Supp. at 686-687. As a result, the court did not reach Korea's argument "that it may not be sued in our courts without its consent," as well as its alternative argument that "even under the new policy of the State Department * * * it [was] still entitled to exemption from suit since the [relevant] acts * * * were public and governmental." *Id.* at 686.

war." 136 U.N.T.S. at 64, art. 14(b). As the D.C. Circuit explained, the Treaty "embodies the foreign policy determination of the United States that *all* claims against Japan arising out of its prosecution of World War II are to be resolved through intergovernmental settlements." Pet. App. 10a (emphasis added; quotation omitted). Thus, the retroactive application of the FSIA to claims arising out of any actions taken by Japan during World War II would clearly upset Japan's settled expectations, regardless of how claims against other nations are resolved.

In distinguishing *Altmann*, the D.C. Circuit observed that "there was no similar treaty with Germany or Austria, and therefore no similar settled expectation." *Id.* at 11a. Petitioners note that the United States entered into treaties with Germany and Austria providing for the restitution of certain confiscated property. Pet. 6. Those treaties also embody the Executive Branch's foreign policy determination that Nazi reparation claims are matters to be resolved through government-to-government negotiations, not private litigation, which is one reason the Ninth Circuit was mistaken in *Altmann*. But in any event, unlike the San Francisco Treaty, *none* of those treaties *expressly* waived all claims of the signatories and their nationals for actions taken in the course of the prosecution of the war.

Petitioners also note that China and Korea were not parties to the San Francisco Treaty. Pet. 16. As the D.C. Circuit explained, however, the Treaty "further provides that Japan would resolve the war-related claims of other United Nations member states and their nationals 'on the same or substantially the same terms,' that is, through intergovernmental agreements, *see* art. 26, as in fact it did." Pet. App. 11a. Thus, as the court held, "Japan could not have expected to be sued in a court of the United States by either an Allied national *or a Chinese or Korean national* for a claim arising out of World War II because the Allied Powers had respectively waived the claims of their nationals and expressed a

clear policy of resolving the claims of other nationals through government-to-government negotiations." *Id.* (emphasis added).

Petitioners further contend that "[a]t most, the Treaty could have affected Japan's expectations from September 8, 1951, when it was signed, until May 19, 1952, when the United States adopted the restrictive theory." Pet. 17. Even if that were true, it would not change the fact that Japan had a legitimate expectation at the time it signed the Treaty that it would not be sued in the courts of the United States for any actions taken in the prosecution of the war, including the events alleged here, and that retroactive application of the FSIA would clearly upset that expectation. The Treaty was necessarily negotiated against the backdrop of the absolute immunity principles of the day, and retroactive application of the FSIA more than a half century later would undermine the foundation of a landmark agreement that is integral to this Nation's security and diplomatic relationships in the Asia-Pacific region and the entire world.

Thus, for these reasons (among others), the D.C. Circuit's decision would have to stand regardless of how this Court resolves *Altmann*. As the D.C. Circuit concluded, the San Francisco Treaty—which is the supreme law of the land as much as any statute—provides an independent basis for dismissal. In these circumstances, no purpose would be served by prolonging this litigation any further.

2. Second, *Altmann* involves the FSIA's expropriation exception, whereas this case involves the commercial activity exception. The Ninth Circuit held that the expropriation exception applied retroactively in *Altmann* in part because—in its view—the so-called *Bernstein* letter announced a policy to strip Austria of immunity for Nazi expropriations of private property. *See Altmann*, 317 F.3d at 965-966. Although Japan believes that the Ninth Circuit's reliance on the

Bernstein letter was erroneous,[8] as the D.C. Circuit concluded below, there is no "similar statement of policy regarding the alleged acts of Japan." Pet. App. 12a. Petitioners contend that the D.C. Circuit was mistaken, but do not identify a single specific statement announcing a similar policy. Instead, they vaguely refer to a "a series of declarations * * * directed at all enemy nations." Pet. 7. Petitioners also cite a State Department bulletin "condemn[ing]" Japan's World War II conduct. *Id.* But expressions of moral outrage simply do not translate into a foreign policy determination to abrogate sovereign immunity.

3. Third, the Ninth Circuit relied in part on the fact that "Austria itself had adopted the restrictive theory" prior to 1952. *See Altmann*, 317 F.3d at 966. The Ninth Circuit erred in relying on foreign law, which has never been relevant in determining whether a foreign sovereign is entitled to immunity in *this* country. Nevertheless, the same document that establishes that Austria had adopted the restrictive theory before 1952—the Tate Letter—also makes clear that by that time Japan had not. *See* Letter from Jack B. Tate, Acting Legal Advisor, to Acting Attorney General Philip V. Perlman (May 19, 1952), *reprinted in* 26 Dep't State Bull. 984 (1952). Thus, to the extent the retroactivity of the FSIA's immunity exceptions turns on whether a nation had adopted the restrictive theory before 1952, that factor requires non-retroactivity with regard to Japan.

4. Because the decision below is distinguishable from the Ninth Circuit's decision in *Altmann* in numerous respects, the conflict posited by petitioners is illusory. Accordingly, *Altmann* provides no basis upon which to grant certiorari. Nor is there any reason to hold this case pending this Court's

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[8] The *Bernstein* letter concerned the act of state doctrine, not the doctrine of foreign sovereign immunity. *See Bernstein*, 210 F.2d at 375. The two are distinct doctrines. *See Banco Nacional de Cuba* v. *Sabbatino*, 376 U.S. 398, 401, 438 (1964).

decision in *Altmann*. Even if the Court were to affirm the Ninth Circuit's ruling in *Altmann*—although it should not—that would not undermine the D.C. Circuit's judgment in this case.

Moreover, numerous alternative grounds exist on which to affirm dismissal of petitioners' complaint. As the District Court held, even if the FSIA applies retroactively, the commercial activity exception does not apply in this case because the conduct alleged "certainly is not commercial in nature." Pet. App. 36a. As the District Court also held, the complaint is barred by the political question doctrine, because petitioners' claims are matters to be addressed solely "at the government-to-government level." Pet. App. 44a. As noted, the D.C. Circuit accepted this argument as a predicate to its holding on sovereign immunity. In addition to the grounds on which the District Court ruled, Japan asserted several other grounds for dismissal: (1) that petitioners' claims are barred by the applicable statute of limitations; (2) that petitioners have no private right of action under the ATCA; (3) that the comity of nations doctrine requires dismissal; and (4) that the complaint should be dismissed under the doctrine of *forum non conveniens*. Because the judgment below may be sustained on *any* of these grounds, there is no need for the Court to delay the final disposition of this case. In short, regardless of how the immunity issue is resolved, there would be no basis for a U.S. court to entertain claims brought by foreign nationals against a foreign nation for wartime military actions that occurred in Asia more than a half century ago.

III. THERE IS NO *JUS COGENS* EXCEPTION TO SOVEREIGN IMMUNITY.

Petitioners also ask this Court to grant certiorari in this case to decide whether foreign sovereigns are entitled to immunity from suits "based on their wartime acts." Pet. 17. Although petitioners avoid framing the question as such, petitioners are

essentially asking this Court to decide whether there is a *jus cogens* exception to sovereign immunity. Petitioners thus neglect to mention that *every* circuit court to consider the issue has squarely held that the violation of *jus cogens* norms does *not* constitute a waiver of immunity under the FSIA. *See* Pet. App. 14a-15a; *Sampson* v. *Federal Republic of Germany*, 250 F.3d 1145, 1156 (7th Cir. 2001); *Smith* v. *Socialist People's Libyan Arab Jamahiriya*, 101 F.3d 239, 245 (2d Cir. 1996), *cert. denied*, 520 U.S. 1204 (1997); *Siderman de Blake* v. *Republic of Argentina*, 965 F.2d 699, 718-719 (9th Cir. 1992), *cert. denied*, 507 U.S. 1017 (1993). Petitioners cite former Judge Wald's dissent in *Princz*, but a conflict within a particular panel is not one of this Court's criteria for certiorari. *See* S. Ct. Rule 10.

Petitioners attempt to frame the inquiry as whether, "*even if the FSIA does not apply* to cases arising from Japan's actions * * *, sovereign immunity should still be denied." Pet. 15-16 (emphasis added). But that is just another way of arguing that there is a *jus cogens* exception to immunity under the FSIA. As this Court has recognized, the FSIA "provides the *sole* basis for obtaining jurisdiction over a foreign state." *Argentine Republic* v. *Amerada Hess Shipping Corp.*, 488 U.S. 428, 439 (1989) (emphasis added). Under the U.S. legal system, it is thus up to Congress, not the courts, to create new exceptions to immunity. *See* Pet. App. 14a ("the fundamental premise of [*Princz*]—that a court cannot create a new exception to the general rule of immunity under the guise of an 'implied waiver'—remains sound"); *Princz*, 26 F.3d at 1174 n.1; *Sampson*, 250 F.3d at 1154-55; *cf. Republic of Mexico* v. *Hoffman*, 324 U.S. 30, 35 (1945) ("It is therefore not for the courts to deny an immunity which our government has seen fit to allow, or to allow an immunity on new grounds which the government has not seen fit to recognize."). Petitioners' invitation to usurp Congress's authority should be declined.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

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IN THE

Supreme Court of the United States

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Petitioners,

v.

Government of Japan,

Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the District of Columbia Circuit

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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6 Dep't State Bull. 123 (Feb. 6, 1942) 5

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8 Dep't State Bull. 49-55 (Jan. 16, 1943) 5

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INTRODUCTION

As demonstrated in the Petition for Certiorari, the decision below conflicts with this Court's retroactivity jurisprudence. *See* Petition at 4-12. Respondent's attempt to explain away this conflict does not require any reply beyond the discussion set forth in the Petition.

Respondent also seeks to distinguish this case from the Ninth Circuit's contrary decision in *Altmann v. Republic of Austria,* 317 F.3d 954 (9th Cir. 2002), *cert. granted,* 124 S. Ct. 46 (Sept. 30, 2003). As demonstrated below, none of the distinctions proffered by Respondent is valid, and the Court should grant the Petition to reconcile the conflict between the Ninth and District of Columbia Circuits regarding the retroactivity of the exceptions to sovereign immunity set forth in section 1605(a) of the FSIA.

Respondent fails to address the second question presented in the Petition, choosing instead to answer an entirely different question. Respondent's failure to address the second question presented in the Petition should be deemed an acknowledgment that this important and unresolved question of law warrants the Court's review.

Finally, Respondent urges the Court to affirm the judgment below on various bases not addressed by the court of appeals. Respondent, however, suggests no reason why the Court should abandon its usual practice of declining to reach questions not addressed by the court below. Respondent's invitation to address these issues prior to their resolution by the court of appeals should be rejected.

I. RESPONDENT CANNOT PERSUASIVELY DISTINGUISH *ALTMANN*.

In *Altmann*, the Ninth Circuit held that "application of the FSIA to the pre-1952 actions of the Republic of Austria is not impermissibly retroactive." 317 F.3d at 967.[1] Here, conversely, the court below held that "the commercial activity exception to the FSIA does not apply retroactively to events, such as those alleged in this case, occurring before May 19, 1952." App. 16a. These two decisions plainly conflict, unless one excepts the rather bizarre proposition that the FSIA's expropriation exception to sovereign immunity, set forth at 28 U.S.C. § 1605(a)(3), applies retroactively, while the FSIA's commercial activity exception to sovereign immunity, set forth at 28 U.S.C. § 1605(a)(2), does not. Respondent offers three purported distinctions of *Altmann*, each of which is unavailing.

1. Respondent first purports to distinguish *Altmann* based on the 1951 Treaty with Japan. *See* Brief in Opposition at 16. This purported distinction fails for at least three reasons. First, as Respondent concedes, the United States entered into a series of post-World War II treaties with Germany and Austria that, like the Treaty with Japan, provided for reparation claims of signatory nations to be

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[1]This Court granted certiorari in *Altmann* on the question, "Does the expropriation exception of the [FSIA] afford jurisdiction over claims against foreign states based on conduct that occurred before the United States adopted the restrictive theory of sovereign immunity in 1952?"

resolved through government-to-government negotiations.[2] *See* Brief in Opposition at 17. There is thus no relevant distinction between the Treaty with Japan and the treaties with Germany and Austria.

Second, like all treaties, the 1951 Treaty with Japan can extinguish only the claims of citizens of signatory nations. *See Flores v. S. Peru Copper Corp.*, 343 F.3d 140, 162 (2d Cir. 2003); *United States v. Yousef*, 327 F.3d 56, 95 n.28 (2d Cir.), *cert. denied*, 124 S.Ct. 353, 492 (2003). Neither Korea nor China was a party to that Treaty, and most of the Petitioners are citizens of these countries.

Third, even if the 1951 Treaty could somehow affect Japan's settled expectations regarding claims by citizens of non-signatory nations – a dubious proposition at best – it

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[2] Both parties agree that the court below's conjecture that "there was no similar treaty with Germany or Austria," App. 11a, was mistaken. Respondent's contention that none of the treaties with Germany and Austria waived the claims of the signatories and their nationals is similarly mistaken. For example, Article 2A of the Paris Reparations Agreement of 1946, regarding reparations by the former Nazi powers, contains such a waiver: "The Signatory Governments agree among themselves that their respective shares of reparation, as determined by the present Agreement, shall be regarded by each of them as covering all its claims and those of its nationals . . . ." In its Brief for Amicus Curiae Japan in Support of Petitioners, at 25, n.5, *Republic of Austria v. Altmann*, 03-13 (Nov. 2003), Respondent argues that the 1951 treaty with Japan and the treaties with Germany and Austria operate in a similar fashion, contradicting its argument here.

could conceivably have affected such expectations only from September 8, 1951, when it was signed, until May 19, 1952, when the United States adopted the restrictive theory of sovereign immunity later codified in the FSIA. Japan's expectations regarding immunity from 1931 to 1945, when it abducted young women and charged Japanese soldiers money for their violation, cannot possibly have been colored by a Treaty signed years later.

2. Respondent next purports to distinguish *Altmann* based on the fact that *Altmann* involved the expropriation exception to sovereign immunity, while this case involves the commercial activity exception. Brief in Opposition at 18. The FSIA lists seven "[g]eneral exceptions to the jurisdictional immunity of a foreign state." 28 U.S.C. § 1605(a)(1)-(7). Petitioner can think of no reason why some, but not all, of these exceptions to sovereign immunity should apply retroactively, and Respondent offers none.

Respondent cites the Ninth Circuit's discussion of the "*Bernstein* letter" in support of this purported distinction.[3] Brief in Opposition at 18-19. However, as Respondent acknowledges, the *Bernstein* letter is simply irrelevant, as it "concerned the act of state doctrine, not the doctrine of sovereign immunity." *Id.* at 19 n.8 (citations omitted).

Moreover, the *Bernstein* letter echoed a series of declarations, referred to in the Bernstein letter itself, that were directed at *all* enemy nations, including Japan. For example,

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[3]Portions of this letter, but not the whole, are reprinted in *Bernstein v. N.V. Nederlandsche-Amerikaansche,* 210 F.2d 375 (2d Cir. 1954).

the "*Declaration Regarding Forced Transfers of Property in Enemy Controlled Territory*," 8 Dep't State Bull. 21 (Jan. 9, 1943), was "a formal warning" to all enemy nations, including Japan, that the Allied countries

> intend to do their utmost to defeat the methods of dispossession practiced by the governments with which they are at war against the countries and peoples who have been so wantonly despoiled . . . [and] reserve all their rights to declare invalid any transfers of, or dealings with, property, rights and interests of any description whatsoever which are, or have been, situated in the territories which have come under the occupation or control, direct or indirect of the governments with which they are at war.

Id. at 21-22. The fact that this policy, targeted at all enemy nations, was cited in a letter provided to the plaintiffs in a case involving Germany does not limit the application of the underlying policy to Germany.[4]

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[4]The State Department issued additional warnings specifically addressing Japan's conduct, condemning Japan's treatment of noncombatants, warning that the United States would hold perpetrators personally and officially responsible, and specifically condemning rape and pandering. *See, e.g.*, 5 Dep't State Bull. 476 (Dec. 13, 1941); 10 Dep't State Bull. 277 (Mar. 25, 1944); 5 Dep't State Bull. 470 (Dec. 13, 1941); 8 Dep't State Bull. 49-55 (Jan. 16, 1943); 6 Dep't State Bull. 123 (Feb. 6, 1942); 6 Dep't State Bull. 169 (Feb. 21, 1942); 8 Dep't State Bull. 337 (Apr. 24, 1943); 10 Dep't State Bull. 115 (Jan.

3. Finally, Respondent notes that Austria adopted the restrictive theory of sovereign immunity prior to 1952. Brief in Opposition at 19. As Respondent concedes, however, "foreign law . . . has never been relevant in determining whether a foreign sovereign is entitled to immunity in *this* country." *Id.* (emphasis in original). Respondent thus relies, as it did with the *Bernstein* letter (which Respondent concedes is irrelevant to the issue of sovereign immunity), on a purported distinction even Respondent apparently finds unconvincing.

In order to prevent inconsistency between the application of the FSIA here and that in *Altmann*, the Court should either grant the Petition or hold it pending the Court's decision in *Altmann*.

II. RESPONDENT MISCHARACTERIZES, AND FAILS TO ADDRESS, THE SECOND QUESTION PRESENTED BY PETITIONERS.

The second question presented in the Petition is, "Even absent the FSIA, are enemy nations entitled to sovereign immunity from suits based on their wartime acts, particularly when those acts occur on United States soil?"

Since the doctrine of sovereign immunity was first announced in *The Schooner Exchange v. M'Faddon,* 11 U.S. 116 (1812), the Court has repeatedly referred to the immunity enjoyed by "friendly" foreign sovereigns in American courts.

29, 1944); 10 Dep't State Bull. 340 (Apr. 15, 1944); 10 Dep't State Bull. 342 (Apr. 15, 1944).

See The Schooner Exch., 11 U.S. at 145-46; *see also Verlinden B.V. v. Cent. Bank of Nigeria*, 461 U.S. 480, 486 (1983); *Republic of Mexico v. Hoffman*, 324 U.S. 30, 34-36 (1945); *Ex parte Republic of Peru*, 318 U.S. 578, 587-89 (1943). It is therefore questionable whether, prior to passage of the FSIA, enemy nations had any reasonable expectation of immunity from suit.[5] Indeed, the Second Circuit recently expressed doubt that the doctrine of sovereign immunity should apply to suits based on wartime conduct by enemy nations. *See Abrams v. Société Nationale des Chemins de Fer Français*, 332 F.3d 173, 187 (2d Cir. 2003); *see also Princz v. Fed. Republic of Germany*, 26 F.3d 1166, 1179 (D.C. Cir. 1994) (Wald, J., dissenting); *Flota Maritima Browning de Cuba, S.A. v. Motor Vessel Ciudad de la Habana*, 335 F.2d 619, 623 n.10 (4th Cir. 1964) (noting authority for inapplicability of immunity doctrine to unfriendly powers). *Cf. Johnson v. Eisentrager*, 399 U.S. 763, 769 (1950) (law recognizes distinction between friendly and enemy aliens).

Rather than address this issue, Respondent constructs a straw man and knocks him down with a flourish. Respondent conspicuously ignores the Petition's discussion of whether enemy nations should be afforded the same immunity as friendly nations and somehow surmises that Petitioner actually seeks to convince the Court to adopt a *jus cogens* exception to sovereign immunity. *See* Brief in Opposition at 20-21. Respondent's failure to address the real question presented is telling.

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[5]After all, "foreign sovereign immunity is a matter of grace and comity on the part of the United States, and not a restriction imposed by the Constitution." *Verlinden*, 461 U.S. at 486.

As the Second Circuit reasoned in *Abrams*, "[T]he State Department's treatment of ordinary litigation with friendly foreign states in times of peace does not necessarily indicate the position the Department would have taken on claims closely related to war-time crimes of an enemy." *Abrams*, 332 F.3d at 187. Nor does anything in this Court's jurisprudence indicate that prior to passage of the FSIA, enemy nations would have received the same immunity from suit as friendly nations. Indeed, the Court's frequent reference to the immunity from suit traditionally afforded "friendly" nations implies to the contrary.

To the extent the Court entertains any doubt that the FSIA applies to cases arising from pre-1952 conduct, the Court should grant the Petition to address the important and unresolved question whether, absent the FSIA, enemy nations are entitled to sovereign immunity. In the alternative, because the Court's decision in *Altmann* will likely implicate this question, the Court should hold the Petition pending its decision in *Altmann*.

III. THE COURT SHOULD DECLINE RESPONDENT'S INVITATION TO REACH ISSUES NOT ADDRESSED BY THE COURT OF APPEALS.

Respondent alleges various alternative grounds on which the decision below could purportedly be affirmed.[6]

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[6] The D.C. Circuit did not hold, as Respondent appears to imply, that outside the sovereign immunity context the San Francisco Treaty "provides an independent basis for dismissal." Brief in Opposition at 18. Because treaties can extinguish only

Brief in Opposition at 20. For reasons briefed at length by Petitioners below, each of these grounds is wholly without merit. The Court "ordinarily do[es] not decide in the first instance issues not resolved below," *Pierce County v. Guillen,* 537 U.S. 129, 148 n.10 (2003), and Respondent suggests no reason why an exception should be made here. If the Court agrees with Petitioners that the court of appeals erroneously applied the doctrine of sovereign immunity to bar Petitioners' claims, the courts below can, on remand, address Respondent's other asserted bases for dismissal.

Moreover, Respondent repeatedly confuses the FSIA's grant of jurisdiction with the substantive law of liability. The FSIA, unlike False Claims Act at issue in *Hughes Aircraft Co. v. United States,* 520 U.S. 939 (1997), relied upon by Respondent, does not provide a substantive cause of action. Trafficking in women was illegal, and a violation of international law, at the time Japan established "comfort stations" all over Asia and on U.S. soil, and it remains illegal today. *See, e.g. International Convention for the Suppression of the White Slave Traffic*, May 4, 1910; *Protocol to Prevent, Suppress, and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention Against Transnational Organized Crime*, G.A. Res. 55/25 Annex II, U.N. GAOR, 55th Sess., Supp. No. 49, at 60, at Art. 3 (2001); White Slave Traffic (Mann) Act, Pub. L. No. 277, § 395, 36 Stat. 825 (1910); Victims of Trafficking and Violence Protection Act of 2000, 22 U.S.C. § 7101.

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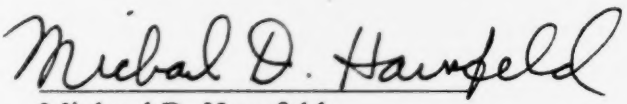
the claims of signatory nations and their citizens, the Treaty cannot, and does not, bar plaintiffs' claims. *See Flores,* 343 F.3d at 162; *Yousef,* 327 F.3d at 95 n.28.

CONCLUSION

For the foregoing reasons, and those presented in the Petition, the Court should grant certiorari on each of the two questions presented by the Petition. In the alternative, the Court should hold the Petition pending decision of the closely related question on which the Court granted certiorari in *Altmann*.

Respectfully submitted,



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